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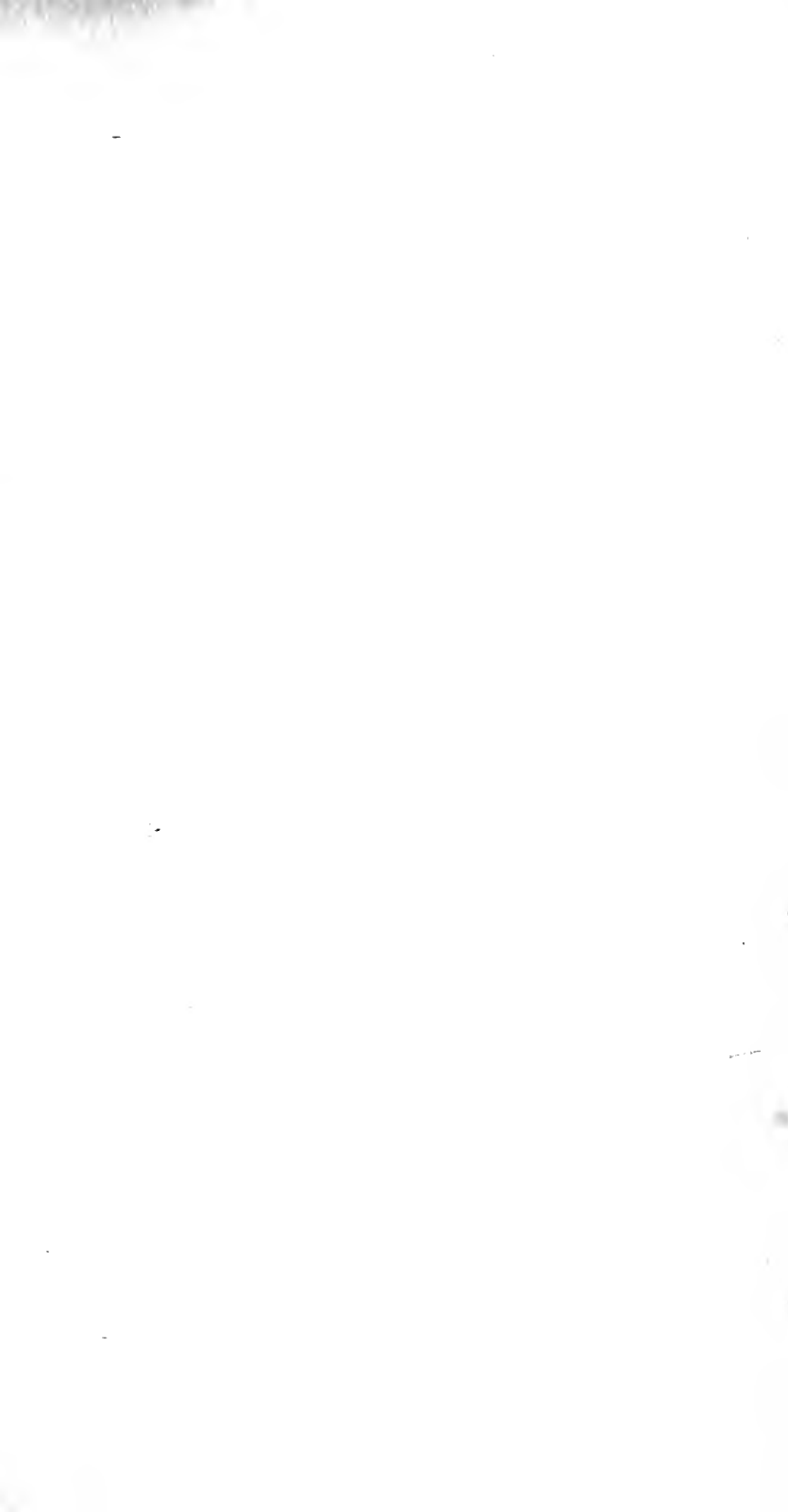
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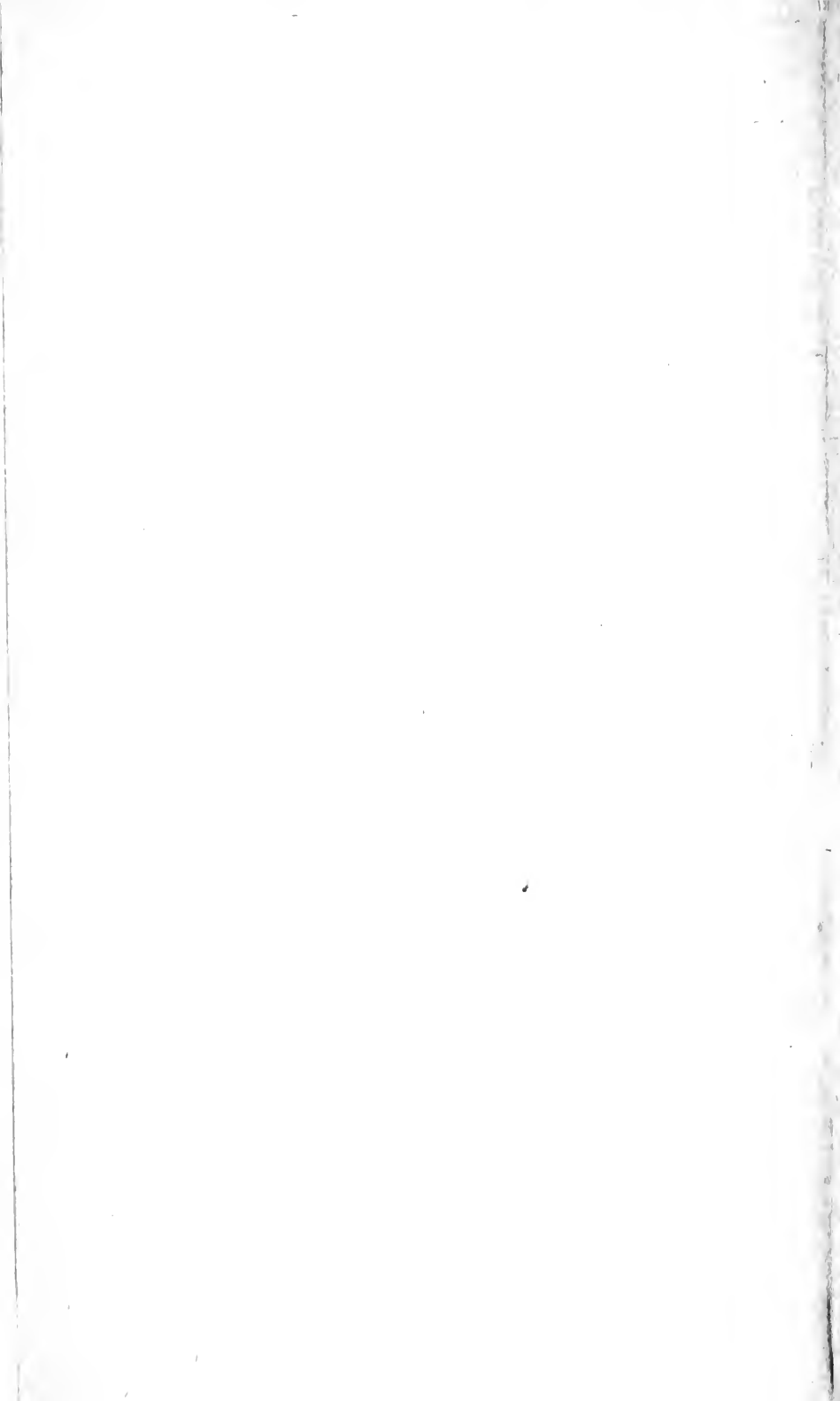
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U.S. CA 3067
No. 15920 ✓

United States
Court of Appeals
for the Ninth Circuit

EINAR GLASER and DOROTHY GLASER,
Appellants,

vs.

MARGUERITE L. CONNELL and WILLIAM
F. WHITE and JANET D. WHITE,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

FILED

MAY 20 1958

PAUL P. O'BRIEN, CLERK

No. 15920

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Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

WAYNE W. WRIGHT,
455 Olympic National Building,
Seattle 4, Washington,

LEO LEVENSON,
1002 Portland Trust Building,
Portland, Oregon,

NORMAN B. KOBIN,
314 Portland Trust Building,
Portland 4, Oregon,

Attorneys for Appellants and
Cross-Appellees.

MALCOLM S. McLEOD,
Dexter Horton Building,
Seattle 4, Washington,

WILLIAM F. WHITE of
WHITE, SUTHERLAND AND WHITE,
1100 Jackson Tower,
Portland 5, Oregon,

Attorneys for Appellee and Cross-
Appellant Marguerite L. Connell.

In the District Court of the United States, Western
District of Washington, Northern Division

Civil No. 4199

EINAR GLASER and DOROTHY GLASER,
his wife, Plaintiffs,
vs.

MARGUERITE L. CONNELL, a widow, and
WILLIAM S. WHITE and JANE DOE
WHITE, his wife, Defendants.

PRE TRIAL ORDER

As the result of pre trial conference heretofore had, whereat the plaintiff was represented by Wayne Wright, Esq., Leo Levenson, Esq. and Norman B. Kobin, Esq., and defendant Marguerite L. Connell was represented by Malcolm S. McLeod, Esq., and William F. White, Esq., of Messrs. White, Sutherland and White, their respective attorneys of record, the following issues of fact and law were framed and exhibits identified:

Admitted Facts

As to plaintiff's claim upon complaint:

1. That the plaintiffs, Einar Glaser and Dorothy Glaser are residents and citizens of the State of Oregon; that defendant Marguerite L. Connell is a resident and citizen of the State of Washington; that defendants William F. White and his wife, Janet D. White, are residents and citizens of the

State of Oregon; that last named defendants were served summons and complaint in this cause at Portland, Oregon and have not appeared in said cause. That the amount in controversy between plaintiff and defendants, exclusive of costs and interest, is in excess of \$3,000.00.

2. That defendant Marguerite L. Connell, is a widow and the owner and in possession of residential real property located at 2812 Mt. St. Helens Place, Seattle, Washington, as described in both the complaint and the mortgage herein involved.

3. That the certain promissory note dated July 12, 1950, plaintiffs' Exhibit No. 1 as referred to in paragraph III of plaintiffs' complaint was executed by defendant Marguerite L. Connell at Portland, Oregon, during the month of July, 1951. That the mortgage dated July 12, 1950, plaintiffs' Exhibit No. 2 and referred to in paragraph IV of plaintiffs' complaint was executed by defendant Marguerite L. Connell at Portland, Oregon during the month of July, 1950, or July, 1951. That the execution of each and both of said promissory note and mortgage by defendant Marguerite L. Connell was induced and procured by fraud practiced upon her by the acts of Holdorf Oyster Corporation, the original payee and mortgagee, Dwight Holdorf, E. R. Errion, and others.

Holdorf Oyster Corporation was the alter ego of E. R. Errion.

4. That said mortgage was recorded August 14, 1951 in the office of the King County Auditor, Seat-

tle, Washington in Volume 2853 of Mortgages at page 521. That on or about September 12, 1951 a written assignment of said mortgage to the plaintiffs herein, dated August 8, 1951, Plaintiffs' Exhibit No. 3 was recorded with the King County Auditor, Seattle, Washington in Volume 2862 of Mortgages at page 146.

5. That plaintiffs did pay the sum of \$518.05 on account of delinquent real property taxes on said real property in September, 1955 and defendant Marguerite L. Connell has since paid on account of delinquent real property taxes the sum of \$525.08 during September, 1956; that real property taxes for the years , , , totaling \$. , for principal penalties and interest are unpaid.

6. That defendant Marguerite L. Connell has never paid any money whatsoever on account of said note and mortgage. There is unpaid on said note the full sum of \$16,000.00 plus interest thereon. That the first demand by plaintiffs for payment was made upon Marguerite L. Connell by letter dated December 16, 1953 and then for full amount of principal and interest due thereon.

7. That plaintiffs purchased said note and mortgage from the Holdorf Oyster Corporation for a valuable consideration to wit: the sum of \$16,000.00 or or about August 8, 1951 and now are the owners thereof, as transferees or assignees, and not as holders in due course; but having acquired the same without actual knowledge of the fraud practiced

upon the defendant Marguerite L. Connell by their assignor.

(By this admission of fact the parties agree it shall not preclude evidence or findings of fact in previous litigation, if otherwise competent, to establish facts to show the equities of the parties even though such be inconsistent therewith.)

8. Both parties agree that their clients will be present at the trial of this cause.

* * * * *

Contentions of Plaintiffs

As to plaintiffs' claim upon complaint:

1. Plaintiffs and defendant were each defrauded by the acts of E. R. Errion, Holdorf Oyster Corporation, and others. Both parties respectively are innocent of any fraud. The sole issue is whether or not plaintiffs or defendant should bear the loss caused by the acts of Errion. Defendant by her acts and conduct made it possible for Errion, Holdorf Oyster Corporation and others to defraud plaintiffs and hence the loss should be borne by defendant.

2. As a matter of law, under the facts and circumstances, plaintiffs are entitled to judgment as prayed for in the complaint, for the reason the defendant was the party who made it possible for E. R. Errion to fraudulently obtain from the plaintiffs the sum of \$16,000.00 in payment for the note and mortgage executed and delivered by defendant and she is estopped from contending that the plaintiffs have no better title to the promissory note and

mortgage than their assignor in that it was the defendant who made it possible for E. R. Errion to obtain \$16,000.00 from these plaintiffs for the aforesaid note and mortgage.

3. The equities are with plaintiffs in that, Marguerite Connell, by executing the note and mortgage and placing them in the hands of her agent, E. R. Errion, gave him the power to defraud the plaintiffs, and because of her conduct, the law protects the plaintiffs, for under the doctrine of estoppel, when one of two innocent persons must suffer a loss, it must be borne by that one of them who, by his conduct, has rendered the injury possible.

4. E. R. Errion was employed by the defendant, Marguerite Connell, and was her agent to sell the real property, the subject matter of this litigation. He was to sell the same for \$36,000.00. Mrs. Connell had previously conveyed this property to the Holdorf Oyster Corporation, and it was agreed by Mrs. Connell and Errion that he would cause the Holdorf Oyster Corporation to convey the said real property back to Mrs. Connell, and they agreed that she simultaneously therewith would execute a note and mortgage in the amount of \$16,000.00 to the Holdorf Oyster Corporation. It was agreed by Mrs. Connell and Errion that she was to receive \$20,000.00 from the sale of the property and that Errion was to receive \$16,000.00. By her aforesaid conduct she placed it within the power of her agent to defraud an innocent purchaser, and the law will protect the latter.

5. The equities in this case are with plaintiffs for the following reasons:

That as appears in plaintiffs' Exhibit #4 (Findings of Fact in District Court Case No. 3556) in the year 1949, the defendant, based upon fraudulent representations of E. R. Errion and others, entered into divers business transactions with said E. R. Errion and others for which she expected substantial profit; that said transactions were carried on by her and Errion and others through the years 1949, 1950, 1951, 1952 and into the year 1953;

That prior to the execution of the note and mortgage herein, defendant had knowledge and was aware that many of the promises and representations of Errion and others had not materialized and defendant not having received the moneys and profits from said transactions which she had expected, and not having received any benefits from these transactions, demanded moneys from the said E. R. Errion on many occasions and commenced to doubt and was concerned about his honesty and integrity;

That prior to the execution of the note and mortgage at issue in this suit, defendant not having received moneys from Errion in accordance with their agreement, endeavored to borrow moneys upon a lease which Errion had procured for her and which he had represented she could borrow money upon; that defendant was unsuccessful in so doing and called same to his attention and called upon E. R. Errion for moneys.

That on July 12, 1951, defendant was vested by

E. R. Errion with the title to the real property, the subject matter of this suit; that thereafter, in order to raise moneys as demanded by defendant, she authorized him to sell her home for the sum of \$36,000.00, upon an agreement with E. R. Errion that she was to execute a note dated back to July 12, 1950, and a mortgage, and Errion would shortly thereafter sell said property and defendant would receive \$20,000.00 in cash and with the understanding that Holdorf Oyster Corporation would receive \$16,000.00 out of said sale.

That in pursuance of said plan Errion represented to defendant that a sale could be best made if he could represent to a prospective purchaser that the promissory note appear to be over a year old and one that would have to be paid in accordance with its terms. Defendant recognized this as a questionable transaction and despite Errion's previous broken promises, concurred with him in this plan and freely and knowingly executed said note and delivered same to him and thus placed same into commercial channels;

That E. R. Errion authorized by defendant to consummate a sale as aforesaid and in possession of said note and mortgage, fraudulently represented to the plaintiffs herein that said note was in all respects genuine and a valid obligation and that said mortgage was likewise in all respects genuine and a valid security to insure payment of said note and did, based upon such representation, sell, transfer, and assign said note and mortgage to the plaintiffs herein and was paid the sum of \$16,000.00;

That the defendant herein by all the aforesaid conduct placed it within the power of her agent, Errion, to defraud the plaintiffs who were innocent purchasers, who purchased without knowledge of the fraud, and if defendant was innocent in this transaction, the law will protect plaintiff under the circumstances for it was her conduct that made the injury to plaintiffs possible.

6. As appears from plaintiffs' Exhibit No. 4 (Findings of Facts in the U. S. District Court, case No. 3556), the defendant herein obtained a judgment against E. R. Errion and others, for a total amount of \$83,077.49. In determining the amount of said judgment, the Court considered the note and mortgage at issue in this case as a valid and existing obligation owing and outstanding by the defendant in so far as plaintiffs herein are concerned, and in so doing, rendered a money judgment accordingly, allowing the defendant full credit for the amount thereof; to wit: \$16,000.00 plus interest of \$4,314.68; that by reason thereof defendant is estopped and precluded from contending that said note and mortgage are not valid obligations owing to these plaintiffs, in that, to permit her to so do, would be tantamount to awarding her double indemnity.

7. The final judgment rendered in the case filed in the Superior Court of the State of Washington in and for the County of King, Civil No. 465 340, and the affirmance thereof by the Supreme Court of the State of Washington and the final judgment in Civil No. 3556 of the above-entitled Court, are not

res judicata so far as the issues in this case are concerned.

8. That the Court has jurisdiction over the subject matter and over the defendants William F. White and Janet D. White, husband and wife.

9. Deny all defendant's contentions.

* * * * *

Contentions of Defendant Marguerite L. Connell

As to plaintiffs' claim upon complaint:

1. That the judgment and findings of fact in that certain cause in the Superior Court of the State of Washington for the County of King in No. 465,340 are res adjudicata and binding upon plaintiffs and collaterally estop plaintiffs from introducing evidence or relitigating issues of fact and law therein determined.

2. As a matter of law upon admitted facts defendant Marguerite L. Connell is entitled to judgment dismissing said complaint with prejudice and costs because said note and mortgage was induced and procured from her by fraud of the payee and mortgagee thereof and plaintiffs as assignees have not better title thereto than their assignor which is no legal title whatsoever.

3. As a matter of law the equitable contention of estoppel in pais can not be asserted by plaintiffs to the non-negotiable note and mortgage fraudulently procured in the first instance from defendant Marguerite L. Connell by the assignor thereof.

4. That as a matter of law plaintiffs have the

burden of proving by a preponderance of the evidence their contention of estoppel in pais.

5. As a matter of fact no conduct on the part of defendant Marguerite L. Connell can rise to an estoppel in pais against her from asserting that plaintiffs' title to said note and mortgage is no greater than the title of their assignor which has no title because of assignor's fraud.

6. That as a matter of fact plaintiffs cannot urge the contention of estoppel in pais (or whatever else plaintiffs choose to call it) because plaintiffs themselves acting by and through plaintiff Einar Glaser did not act in good faith and/or exercise due diligence when they took the assignment of said note and mortgage from Holdorf Oyster Corporation in that:

(a) At or prior to receiving said note and mortgage plaintiffs made no inquiry or investigation whatsoever concerning Mrs. Marguerite L. Connell; the value or title to the property covered by the mortgage; whether or not Marguerite L. Connell had paid anything on account of principal or interest on said note or was able to do so; or the status of Holdorf Oyster Corporation and its relationship with E. R. Errion or the character or reputation of E. R. Errion with whom plaintiffs dealt in connection with said note and mortgage; or how or for what consideration or purpose E. R. Errion and/or Holdorf Oyster Corporation had gotten the note and mortgage in the first instance.

(b) At or prior to receiving said note and mort-

gage plaintiffs obtained no title report or title insurance policy covering title to said real property and validity of said mortgage as a lien thereon.

(c) At or prior to receiving said note and mortgage plaintiffs have never seen the real property nor met or talked with Marguerite L. Connell nor did they view, visit or otherwise inspect said real property covered by said mortgage; secure any appraisements as to its value or ascertain that said real property was the home of Marguerite L. Connell and that she was at the time living in it.

(d) At time of receiving said note and mortgage plaintiffs knew that the maker thereof Marguerite L. Connell was in default as to payment of interest provided therein and made no investigation as to reason therefor or whether or not real property taxes on the real property were also delinquent.

(e) Plaintiffs received said note without securing a valid endorsement of Holdorf Oyster Corporation to whose order the note was payable and has never since undertaken to secure a proper endorsement.

(f) Plaintiffs acquired the note and mortgage to hold same temporarily for E. R. Errion, the primary person engaged in the scheme to defraud Marguerite L. Connell.

(g) Plaintiffs were delivered the assignment of mortgage from Holdorf Oyster Corporation by Dwight Holdorf its president, but without the promissory note. The promissory note either before or thereafter was received from E. R. Errion. All

negotiations for the transaction was with E. R. Errion; not any officer of the Holdorf Oyster Corporation.

(h) Plaintiffs paid \$16,000.00 by a series of certified or bank checks made payable to Holdorf Oyster Corporation with intent and for the purpose of accommodating and loaning money to E. R. Errion and not to purchase or invest in said note and mortgage. That the \$16,000.00 was never received by the Holdorf Oyster Corporation, but deposited in another bank account and used for the benefit of E. R. Errion.

(i) That plaintiffs' lack of good faith and due diligence in acquiring said note and mortgage is further inferred from the fact that they made no demand upon Marguerite L. Connell for payment of either the delinquent interest or the principal until two years and four months after acquiring same and then plaintiffs' demand was for the full sum; a demand that could have been made at the time of first acquiring said note and mortgage.

(j) That plaintiffs' lack of good faith and due diligence in acquiring said note and mortgage is further inferred from the fact that plaintiffs did not make demand or bring an action to foreclose upon said real property until after December 16, 1953; until after Marguerite L. Connell had on or about August 28, 1953 commenced an action for fraud against plaintiffs, E. R. Errion, Holdorf Oyster Corporation and others in the above-entitled Court in Civil No. 3556; and until after the said

E. R. Errion called Einar Glaser on a telephone and ordered him to commence action to foreclose against Marguerite L. Connell to retaliate for the fraud action in the first instance brought by Marguerite L. Connell.

(k) Otherwise acted in bad faith and without due diligence and gave little heed to it at time of taking said note and mortgage.

(l) That at no time did Holdorf Oyster Corporation deliver, endorse-over or assign the promissory note in question nor did it receive any consideration for doing so. It did, however, receive \$16,000.00 for the said E. R. Errion.

7. That as a matter of law plaintiffs cannot prosecute this action to foreclose upon said promissory note and mortgage in that they are at most assignees thereof; having obtained the same from Holdorf Oyster Corporation, their assignor which was a Washington corporation and which at all relevant times and prior thereto was doing business in the State of Oregon in securing said note and mortgage from defendant in the first instance at Portland, Oregon; in assigning said note and mortgage to plaintiffs in the State of Oregon; in negotiating and purchasing real property in the State of Oregon; and otherwise doing business in said state without having qualified to do business as a foreign corporation in said state and doing such business unlawfully and in violation of the statutes of the State of Oregon.

8. Denies all contentions of the plaintiffs.

* * * * *

The foregoing pretrial order has been approved by the parties hereto, as evidenced by the signatures of their counsel hereon, and this order is hereby entered, as a result of which the pleadings pass out of the case, and this pretrial order shall not be amended except by Order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

Dated at Seattle, Washington this 6th day of August, 1957.

/s/ GEO. H. BOLDT,

United States District Judge.

Form Approved:

/s/ NORMAN B. KOBIN,

Of Attorneys for Plaintiffs.

/s/ WILLIAM F. WHITE,

Of Attorneys for Defendant

Marguerite L. Connell.

[Endorsed]: Filed August 6, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on regularly for trial before the above-entitled Court sitting without a jury on August 12, 1957; plaintiffs appearing in person and being represented by Wayne Wright, Esq., Leo Levenson, Esq. and Norman B. Kobin, Esq., defendant Marguerite L. Connell appearing in person and being represented by William F. White, Esq., of White, Sutherland &

White and Malcolm S. McLeod; defendant William F. White and Janet D. White sued as William S. White and Jane Doe White, not appearing; the Court having heard and considered evidence both oral and documentary; admitted facts in the pre-trial order; contention of the parties in the pre-trial order; briefs and oral argument on behalf of the respective parties it now makes its:

Findings of Fact on Plaintiffs' Complaint

1. That the plaintiffs, Einar Glaser and Dorothy Glaser were and are residents and citizens of the State of Oregon; that defendant, Marguerite L. Connell was and is a resident and citizen of the State of Washington; that defendant, William F. White and his wife, Janet D. White, were and are residents and citizens of the State of Oregon; that the last named defendants were served summons and complaint in this cause at Portland, Oregon and have not appeared in said cause and that only in rem relief was sought by plaintiffs against them; that the amount in controversy between plaintiffs and defendants, exclusive of costs and interest is in excess of \$3,000.00.

2. That defendant, Marguerite L. Connell, is a widow and the owner and in possession of residential real property located at 2812 Mt. St. Helens Place, Seattle, Washington, and situated in King County, Washington as described in both the complaint and the mortgage herein involved and being as follows:

“Lots 2 and 3, Block 51, of Mount Baker Park,

an Addition to the City of Seattle, according to plat recorded in Volume 16 of Plats, page 3, records of King County, situated in the City of Seattle."

3. That the certain promissory note dated July 12, 1950 in face amount of \$16,000 (Pl. Ex. 1) as referred to in paragraph III of plaintiffs' complaint was executed by defendant Marguerite L. Connell at Portland, Oregon, during the month of July, 1951. That the mortgage dated July 12, 1950, (Pl. Ex. 2) as referred to in paragraph IV of plaintiffs' complaint was executed by defendant, Marguerite L. Connell, at Portland, Oregon during the month of July, 1950 or July 1951. That the execution and delivery of each and both of said promissory note and mortgage by defendant, Marguerite L. Connell, was induced and procured by fraud practiced upon her by the acts of Holdorf Oyster Corporation, the original payee and mortgagee, and others. That at all relevant times, Holdorf Oyster Corporation was a Washington corporation which negotiated and purchased real property in the State of Oregon and negotiated and executed the transaction involved in this case with both plaintiffs and defendants during a time it was never qualified to do business therein and in violation of the laws of the State of Oregon. That at all relevant times, Holdorf Oyster Corporation was the alter ego of E. R. Errion.

4. That said mortgage (Pl. Ex. 2) was recorded August 14, 1951 in the office of the King County

Auditor, Seattle, Washington in Volume 2853 of Mortgages at page 521. That on or about September 12, 1951 a written assignment of said mortgage to the plaintiffs herein dated August 8, 1951 (Pl. Ex. 3) was recorded with the King County Auditor, Seattle, Washington in Volume 2862 of Mortgages at page 146.

5. That defendant, Marguerite L. Connell, has never paid any money whatsoever on account of said note and mortgage. That the first demand by plaintiffs for payment of said note and mortgage was made by letter on December 16, 1953 and prior thereto neither plaintiffs nor defendant, Marguerite L. Connell, had any contact or communication with the other. Defendant, Marguerite L. Connell, did not realize she had executed a mortgage on said real property and she did not know such mortgage had been assigned to plaintiffs until much later. That defendant, Marguerite L. Connell, did know she had executed and delivered to E. R. Errion the said promissory note in July of 1951, but did not know it had been assigned to Einar Glaser contrary to representation of E. R. Errion until much later.

6. That plaintiffs exercised complete indifference and neglect and did not act in good faith at the time they voluntarily purchased said note and mortgage from E. R. Errion in August of 1951 paying \$16,000.00 to Holdorf Oyster Corporation for the benefit of E. R. Errion. Plaintiffs relied upon other transactions with E. R. Errion and not said mortgage to secure repayment of their loan to E. R.

Errion. That plaintiffs did not procure a valid endorsement of the payee of said note at time they acquired it from E. R. Errion. Prior to or at time of acquiring said note and mortgage, plaintiffs knew the note was in default as to the payment of the first year's interest. At said time, plaintiffs made no inquiry or investigation as to title, taxes or ability of Marguerite L. Connell to pay said note when due. E. R. Errion fraudulently misrepresented said note and mortgage to plaintiff by representing it was a valid note and mortgage, knowing at the time he had procured the same by fraud which he had practiced upon the defendant. Defendant, Marguerite L. Connell, was at all relevant times living upon said real property which plaintiffs knew.

7. That plaintiffs hold said note and mortgage as mere assignees and not as holders in due course. That plaintiffs have no legal title to said note and mortgage as such instruments in the first instance were induced and procured from defendant, Marguerite L. Connell, by fraud practiced upon her by E. R. Errion and Holdorf Oyster Corporation, although at the time plaintiffs acquired possession of said note and mortgage they did not have actual knowledge of the fraud practiced upon defendant, Marguerite L. Connell, by plaintiffs' assignors.

8. That defendant at no time conducted herself by any acts or omissions so as to mislead or prejudice plaintiffs as would estop her from asserting as a defense to said note and mortgage that each and

both were induced and procured from her by fraud practiced upon her by plaintiffs' assignors, but defendant was negligent in executing the note and mortgage and delivering such to E. R. Errion.

9. Incorporated by reference in these findings are the complaint, answer of Glasers, tendered findings of fact, signed findings of fact and conclusions of law, judgment and order of dismissal as to defendants Glasers and judgment for plaintiff and against defendants other than the Glasers in amount of \$83,077.48 and costs in Civil Action No. 3556 of the above-entitled Court.

10. That in the afore-mentioned action Civil No. 3556 the defendant herein as plaintiff therein obtained a judgment against E. R. Errion and others not including the plaintiffs in this action in total amount of \$83,077.49. Included in said award of damages for fraud was considered the sum of \$16,000.00 being the principal amount of the promissory note herein and \$4,314.68 being the amount of interest due on said note at time of said judgment. That said judgment in amount of \$83,077.49 has not been satisfied save to extent of \$5,747.57.

11. Incorporated in these findings by reference are the complaint, answer, findings of fact and conclusions of law, opinion of the trial judge and judgment in that certain civil action brought by these plaintiffs against this defendant in the Superior Court of the State of Washington for the County of King, No. 465,340 and the opinion of the Supreme Court of the State of Washington in the

same said case as reported in 47 Wn 2d. 622, 289 P2d 364.

12. The plaintiffs voluntarily paid the sum of \$518.05 on account of delinquent taxes on said real property in September, 1955 in order to prevent a tax foreclosure; that defendant Marguerite L. Connell during the month of September, 1956 voluntarily paid \$525.08 on account of delinquent real property taxes in order to prevent a tax foreclosure.

Findings of Fact On Defendant's
Counterclaim

1. That Marguerite L. Connell is a resident and citizen of the State of Washington and plaintiff Einar Glaser is a resident and citizen of the State of Oregon.

2. That National Forest Products Corporation was a corporation organized under the laws of the State of Washington on June 21, 1948, and at all relevant times was the alter ego of one E. R. Errion.

3. That Einar Glaser executed and delivered Defendant's Exhibit No. 4 to National Forest Products Corporation in Portland, Oregon, on March 17, 1952, and on the same date received \$20,000.00 from National Forest Products Corporation.

4. That Defendant's Exhibit No. 4, the purported promissory note was not a valid and subsisting obligation of Einar Glaser, and was not given for any valuable consideration. It was given by Einar Glaser as an acknowledgment of the receipt of

some of his moneys which were being held by National Forest Products Corporation in trust or otherwise for the use and benefit of Einar Glaser. The purported note was held by National Forest Products Corporation only upon the condition that same would be treated as a receipt for moneys belonging to Glaser and would be returned to him upon settlement of a partnership dispute then existing between Einar Glaser and his partner, McKenney.

5. That Defendant's Exhibit No. 4 was obtained from Einar Glaser upon the fraudulent and false representations of Errion; that same would be retained in Errion's possession; that same would be treated merely as a receipt of money due and belonging to Glaser and said Exhibit No. 4 would be retained in the possession of National Forest Products Corporation and would be cancelled and rendered void upon the settlement of the partnership dispute. Based on said representations, Einar Glaser executed said exhibit and was at all times led to believe and was informed that same had been cancelled and destroyed. No demand for payment was ever made upon Einar Glaser for payment until the demand of defendant.

6. That although hereafter Defendant's Exhibit No. 4 was endorsed in blank, it was not negotiated to Dwight Holdorf but rather was held by E. R. Errion and was subsequently wrongfully converted or misappropriated by Dwight Holdorf.

7. Dwight Holdorf did not pay any consideration

whatsoever for said note, nor did he take same as security for any obligation owing to him by National Forest Products Corporation or E. R. Errion in that National Forest Products Corporation nor E. R. Errion was indebted to Dwight Holdorf in any amount.

8. Defendant did not pay a valuable consideration or any consideration for said note, but merely took same conditionally and for collection purposes with the understanding that if she would collect any money thereon she would credit the net proceeds thereof to the judgment which she had obtained against E. R. Errion, Dwight Holdorf and others in U. S. District Court No. 3556.

9. That defendant at all times was fully aware of the background of Errion and Holdorf and that they had the general reputation of cheaters and defrauders and were confidence men, and had swindled her and others, and when Exhibit No. 4 was delivered to her in July, 1955 she had previously obtained a fraud judgment against Errion, Holdorf and their conspirators, and in so taking said exhibit she did so in bad faith and for collection purposes only and with full knowledge of the chicanery and frauds practiced by E. R. Errion and Dwight Holdorf for many years. She further took same with full knowledge that the U. S. District Court for the District of Washington, Western District, Northern Division had exonerated the plaintiffs from participating in any wrongdoings of Errion and Holdorf, et al.

10. Dwight Holdorf was the president of National Forest Products Corporation and had actual knowledge of all the conditions upon which Exhibit No. 4 was delivered and he participated in the fraud and chicanery practiced upon Einar Glaser in obtaining his signature thereto.

11. That Dwight Holdorf actively participated and conspired with E. R. Errion in their fraudulent schemes practiced upon the plaintiffs and the defendant and upon many other individuals.

12. That during all relevant times National Forest Products Corporation was a corporation organized under the laws of the State of Washington, and was engaged in transacting business in the State of Oregon and maintained a business office therein, and while so transacting business in the State of Oregon did not comply with the Statutes of the State of Oregon in order to qualify to transact business in the State of Oregon, and it never did qualify;

That the writing upon which defendant's counterclaim is based was executed in and was payable in the State of Oregon as part of business transactions carried on by National Forest Products Corporation in the State of Oregon;

That National Forest Products Corporation, not having qualified to transact business in the State of Oregon, and the writing being executed in and payable in the State of Oregon as a part of the transaction of business by National Forest Products Corporation, was void and invalid.

13. That defendant, as plaintiff, commenced an action in the United States District Court for the District of Oregon, Civil No. 8184, on or about the 18th day of July, 1955, upon the promissory note alleged in her counterclaim; that the judgment of dismissal, as entered in said cause by the Honorable Gus J. Solomon, in res judicata to all matters set forth in defendant's counterclaim.

Conclusions of Law

As to plaintiffs' complaint the defendants, Marguerite L. Connell and William F. White and his wife Janet D. White are entitled to a judgment dismissing said complaint, denying foreclosure and declaring void as a lien or encumbrance upon the real property of defendant, Marguerite L. Connell, that certain note and mortgage as described in plaintiffs' complaint, without costs.

As to the counterclaim (cross complaint) of defendant, Marguerite L. Connell against plaintiff Einar Glaser the said plaintiff, Einar Glaser is entitled to a judgment dismissing said counterclaim (cross complaint) and denying same but without costs.

Dated, November 15, 1957.

/s/ GEO. H. BOLDT,
Judge of the U. S. District
Court.

Findings on Counterclaim submitted by
/s/ NORMAN KOBIN,
Of Attorneys for Plaintiffs.

Findings on Complaint submitted by
/s/ WILLIAM F. WHITE,
Of Attorneys for Defendant,
Marguerite L. Connell.

[Endorsed]: Filed November 15, 1957.

In The United States District Court, Western
District of Washington, Northern Division

Civil No. 4199

EINAR GLASER and DOROTHY GLASER, his
wife, Plaintiffs,
vs.

MARGUERITE L. CONNELL, a widow, and
WILLIAM S. WHITE and JANE DOE
WHITE, his wife, Defendants.

JUDGMENT

The above-entitled cause having come on regularly for trial before the above-entitled Court sitting without a jury on August 12, 1957; plaintiffs appearing in person and being represented by Wayne Wright, Esq., Leo Levenson, Esq. and Norman B. Kobin, Esq., defendant Marguerite L. Connell appearing in person and being represented by William F. White, Esq., and Malcolm S. McLeod, Esq.; defendants William F. White and Janet D. White sued as William S. White and Jane Doe White, not appearing; the Court having heard and considered evidence both oral and documentary;

admitted facts in the pre-trial order; contentions of the parties; briefs and oral argument and further the Court having made and entered its Findings of Fact and Conclusions of Law as to both the action set forth in plaintiffs' complaint and the action set forth in the counterclaim (cross complaint) of defendant, Marguerite L. Connell against plaintiff, Einar Glaser and good cause appearing;

It Is Hereby Ordered, Adjudged and Decreed that plaintiff's complaint be dismissed and that defendants, Marguerite L. Connell and William F. White and his wife, Janet D. White, sued herein as William S. White and Jane Doe White, have judgment declaring to be invalid and void as a lien of encumbrance upon that certain real property of defendant, Marguerite L. Connell, situated in King County, Washington and described as:

"Lots 2 and 3, Block 51, of Mount Baker Park, an Addition to the City of Seattle, according to plat recorded in Volume 16 of Plats, page 3, records of King County, situated in the City of Seattle."

that certain promissory note dated July 12, 1950 in face amount of \$16,000.00 together with that certain mortgage dated July 12, 1950 to secure said note as described and recorded August 14, 1951 in the office of the King County Auditor, Seattle, Washington in Volume 2853 of Mortgages at page 521 together with the assignment of said mortgage as recorded in the same office as the mortgage but in Volume 2862 Mortgages at page 146.

It Is Further Ordered, Adjudged and Decreed that the plaintiff, Einar Glaser, have judgment against defendant, Marguerite L. Connell, dismissing the counterclaim (cross complaint) of said defendant against said plaintiff.

It Is Further Ordered, Adjudged and Decreed that both plaintiffs and defendants each bear their own costs.

Dated, November 15, 1957.

/s/ GEO. H. BOLDT,
U. S. District Court Judge.

Approved as to form:

/s/ NORMAN KOBIN,
Of Attorneys for Plaintiff.
/s/ WILLIAM F. WHITE,
Of Attorneys for Defendant.

[Endorsed]: Filed and Entered November 15, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Einar Glaser and Dorothy Glaser, plaintiffs, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from that part of the final Judgment entered in this action and proceedings on November 15, 1957 reading as follows:

“It Is Hereby Ordered, Adjudged and Decreed

that plaintiffs' complaint be dismissed and that defendants, Marguerite L. Connell and William F. White and his wife Janet D. White, sued herein as William S. White and Jane Doe White, have judgment declaring to be invalid and void as a lien of encumbrance upon that certain real property of defendant, Marguerite L. Connell, situated in King County, Washington and described as:

"Lots 2 and 3, Block 51, of Mount Baker Park, an Addition to the City of Seattle, according to plat recorded in Volume 16 of Plats, page 3, records of King County, situated in the City of Seattle."

that certain promissory note dated July 12, 1950 in face amount of \$16,000.00 together with that certain mortgage dated July 12, 1950 to secure said note as described and recorded August 14, 1951 in the office of the King County Auditor, Seattle, Washington in Volume 2853 of Mortgages at page 521 together with the assignment of said mortgage as recorded in the same office as the mortgage but in Volume 2862 Mortgages at page 146."

Dated this 16th day of December, 1957.

EINAR GLASER,
DOROTHY GLASER,

/s/ By LEO LEVENSON,
/s/ NORMAN B. KOBIN,
/s/ WAYNE W. WRIGHT,
Attorneys for Plaintiffs.

[Endorsed]: Filed December 16, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANTS RELY ON THE APPEAL

Appellants submit the following points upon which they intend to rely on the appeal herein, as follows:

I.

The Court erred in not entering a decree in favor of appellants for the foreclosure of their mortgage.

II.

The Findings of Fact and Judgment in Case No. 3556, and thereafter appealed to the United States Court of Appeals, for the Ninth Circuit, No. 14,797, and decided August 10, 1956, is *res judicata* and estops respondent from relitigating said issues in this case at bar.

III.

That in determining the amount of the judgment in Case No. 3556, (paragraph II above) the Court in that case considered the note and mortgage at issue in this case at bar as a valid and existing obligation owing and outstanding by respondent Connell insofar as appellants are concerned, and in so doing, the Court rendered a money judgment allowing respondent full credit for the amount of appellants' note and mortgage. By reason thereof, respondent is estopped in this case at bar from claiming the note and mortgage are not valid obligations.

IV.

That appellants and respondent Marguerite L. Connell are innocent victims. Each was defrauded by the acts of E. R. Errion, Holdorf Oyster Corporation, and others, but by reason of the acts and conduct of respondent Connell, she should bear the loss caused by the fraud of Errion and others.

V.

Respondent in executing the note and mortgage and placing them in the hands of E. R. Errion, made him her agent. By doing so, he was given the power by respondent to defraud appellants. Because of respondent's aforesaid conduct, the law protects appellants under the doctrine of estoppel. When one of two innocent persons must suffer a loss, it must be borne by that one of them who, by his conduct, has rendered the loss possible.

/s/ LEO LEVENSON,

Of Attorneys for Appellant.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed December 18, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the pro-

visions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75 (c) FRCP and designation of counsel, I am transmitting herewith the following original documents in the file dealing with the above action, including exhibits, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers and documents being identified as follows:

14. Pre-Trial Order, filed Aug. 6, 1957.

19. Findings of Fact and Conclusions of Law, filed Nov. 15, 1957.

20. Judgment, filed Nov. 15, 1957.

18. Objections to Findings of Fact and Conclusions of Law Proposed by Defendant Connell, filed Sept. 3, 1957.

21. Notice of Appeal filed by Plaintiffs, Dec. 16, 1957.

22. Bond for Costs on Appeal, filed 12/16/57. (Plaintiffs.)

23. Notice of Appeal by cross-complainant Connell, filed 12/16/57.

25. Bond for Costs on Appeal, (Connell), filed 12/16/57.

26. Plaintiffs' Designation of Contents of Record, filed 12/18/57.

27. Statement of Points on Which Appellants Rely on Appeal, filed 12/18/57.

29. Order Directing Transmission of Original Exhibits, filed 12/18/57.

30. Order Extending Time for filing record on appeal to Mar. 17, 1958, filed Jan. 9, 1958.

31. Court Reporter's Transcript of Proceedings, filed Feb. 20, 1958.

Plaintiffs' Exhibits 1 to 14, inclusive, and Defendant Exhibits A to J, inclusive, K-1, K-2, K-3, K-4, L, M and N.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of appellant and cross-appellant for preparation of the record on appeal in this cause, to-wit: Filing fee, Notice of Appeal, Appellants, \$5.00; Filing fee, Notice of Appeal, Cross-Appellant, \$5.00, and that said amounts have been paid to me by counsel for the respective parties.

Witness my hand and official seal at Seattle this 27th day of February, 1958.

[Seal]

MILLARD P. THOMAS,
Clerk,

/s/ By TRUMAN EGGER,
Chief Deputy.

In The District of the United States, Western
District of Washington, Northern Division

No. 4199

EINAR GLASER and DOROTHY GLASER, his
wife, Plaintiffs,
vs.

MARGUERITE L. CONNELL, a widow, and
WILLIAM S. WHITE and JANE DOE
WHITE, his wife, Defendants.

TRANSCRIPT OF PROCEEDINGS

Transcript of Proceedings of the above-entitled
and numbered cause in the above-entitled court be-
fore the Honorable George H. Boldt, United States
District Judge, commencing on Monday, August
12, 1957, at the United States Courthouse, Seattle,
Washington.

Appearances on behalf of the Plaintiffs: Mr.
Wayne W. Wright, Attorney at law, 455 Olympic
National Bldg., Seattle, Washington. Mr. Leo Lev-
enson, Attorney at law, 1002 Portland Trust Bldg.,
Portland, Oregon. Mr. Norman B. Kobin, Attor-
ney at law, 314 Portland Trust Bldg., Portland,
Oregon. [1] On behalf of the Defendants: Mr.
Malcolm McLeod, Attorney at Law, 861 Dexter
Horton Bldg., Seattle, Washington. Mr. William
F. White, White, Sutherland & White, Attorneys
at law, 1100 Jackson Tower, Portland, Oregon.

Also appeared: Mr. Byron E. McClanahan, Mason County Prosecuting Attorney, Mason County Courthouse, Shelton, Washington. [2]*

* * * * *

MARGUERITE L. CONNELL

called as a witness on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your full name and spell your last?

The Witness: Marguerite L. Connell, C-o-n-n-e-l-l.

Direct Examination

Q. (By Mr. Kobin): You are Marguerite Connell? A. I am.

Q. And where do you live, Mrs. Connell?

A. 2812 Mt. St. Helen's Place.

Q. Seattle, Washington?

A. Seattle, Washington.

Q. Mrs. Connell, if there might be a question that I put to you which you don't readily understand or fully understand, would you please call it to my attention rather than to respond, and I will attempt to reframe the question so that we will both understand each other.

A. Thank you.

Q. And if there is any question which you do not hear in full, Mrs. Connell, you indicate such, will you please? [5] A. Yes.

Q. Prior to 1949, Mrs. Connell, you owned vari-

* Page numbers appearing at top of page of Reporter's Transcript of Record.

(Testimony of Marguerite L. Connell.)

ous real properties and securities and other personal property, did you or did you not?

A. I did.

Q. And these properties are the same properties which were in issue in the Federal Court case that we have talked about in this matter?

A. That's right.

Q. And these are the same properties that Mr. Errion swindled you out of? A. That's right.

Q. Pardon? A. It is, yes.

Q. Mrs. Connell, you have on several occasions given testimony by deposition not only in this case but in other proceedings? A. I have.

Q. And from time to time we will refer to these depositions. A. Yes, sir.

Q. When did you first meet Mr. E. R. Errion?

A. In the spring of '49.

Q. How did you happen to meet Mr. Errion in the spring of 1949?

A. Christmastime I spent the month, best part of the month, [6] with my daughter and her husband in Portland, and a friend of the family for years, Grace Reed, told me that she had a friend who could help me sell. She had been up visiting me here—help me sell that, and that man was Mr. Davenport, she introduced to me and the family, and we all had coffee together, and he sent—what's his name—Errion up here to help me sell my couple of old big houses that I hadn't been able to sell.

Q. So you had two pieces, two big old houses in Seattle that you wanted to sell? A. Yes.

(Testimony of Marguerite L. Connell.)

Q. And this man sent Mr. Errion up to Seattle to sell those houses for you?

A. Well, that was supposed to be what he came for. At least, he told me that.

Q. And you wanted to sell those houses?

A. Yes.

Q. And you were willing—if he could sell them, that would be satisfactory with you?

A. He said he was a real estate man and his partner was.

Mr. Kobin: Miss Reporter, would you read the last question? If you will listen to the question, Mrs. Connell, and respond directly to the question. If you care to explain it, fine.

(Question read by reporter.) [7]

The Witness: Yes.

Q. (By Mr. Kobin): Now, when he started to talk to you about these Coos Bay properties, that was how long afterwards, Mrs. Connell, after you first met Mr. Errion?

A. Probably a day or so.

Q. A day or so after you first met him?

A. About Errion you are talking?

Q. Then he started to talk to you about the Coos Bay properties? A. No.

Q. When did that come up? Would this help you—that was several months later?

A. Yes, months later.

Q. During the interim, was he trying to sell the properties for you but he wasn't getting anywhere, is that correct? A. Correct.

(Testimony of Marguerite L. Connell.)

Q. And you had visited with him many, many times during that interim and discussed the possibilities of selling your properties for you during that interim? A. Yes.

Q. Your answer is yes? A. Yes.

Q. Did Mr. Errion represent to you, Mrs. Connell, that he was a realtor?

A. Yes, I had that impression. [8]

Q. And based upon that, from the fact that he was a realtor—you got that impression—you wanted him to act as such for you?

A. Yes, with some reservations.

Q. You made a conveyance ultimately of these properties to Mr. Errion, did you not?

A. Yes.

Q. And in return you received some deeds to some property, supposedly oyster property down in Coos County, Oregon? A. Yes.

Q. Did you convey the property that is at issue in this case, your residence property, to Mr. Errion back in 1949? A. I did.

Q. And was that in October of 1949?

A. I suppose. It was the end of September, in October. It took time.

Q. Previous to the time that you requested Mr. Errion to sell your home in Seattle, your properties in Seattle, had you had other realtors working during—effecting the sale of those properties?

A. I had.

Q. Pardon? A. Yes.

Q. From 1949, and I think it was in October

(Testimony of Marguerite L. Connell.)

approximately, [9] Mrs. Connell, of 1949, through July of 1951, was the legal title to that property in your name or in one of Errion's corporation's names. A. What time, please?

Q. Between October of 1949 when you deeded the property until July of 1951, was the Seattle property that you had in your name or in one of Mr. Errion's corporations?

A. In Errion's corporation.

Q. You had already deeded the property, the legal title, to Mr. Errion? A. Yes.

Q. Now, between 1949 and July of 1951, were you in constant contact with the Errion bunch?

A. Yes.

Q. And just generally, Mrs. Connell, what did those—what were the purpose of these contacts? Were you discussing these business transactions or were they social?

A. Most of the time I was trying to get money out of him.

Q. Between 1949, then, and July of 1951, most of the occasions for your contacting Mr. Errion was to get money from him, is that correct?

A. Yes.

Q. In other words, many of the promises, Mrs. Connell, that he had made to you didn't come about, isn't that right? A. Yes. [10]

Q. And you were continuously after him for money between that time, is that right?

A. That's right.

Q. Now, in 1950, didn't you tell Mr. Errion that

(Testimony of Marguerite L. Connell.)

you needed \$20,000 badly because you wanted to buy another home? A. I wanted to buy what?

Q. Did you tell Mr. Errion in 1950 or the early part of 1951 that you would like to have \$20,000 so that you could purchase another home?

A. That's right.

Q. And did you have that discussion with him on several occasions? A. Yes.

Q. Did he eventually agree to get that \$20,000 for you? A. Yes.

Q. Now, previous to that time, Mrs. Connell, and while you were talking about this \$20,000, didn't Mr. Errion tell you that he was handling a large logging deal down in the State of Oregon?

A. Yes.

Q. And how did the name of Glaser or Einar or McKinney first come about in your conversations? [11]

* * * * *

Q. (By Mr. Kobin): When, if ever, Mrs. Connell, did you first find out or hear the name of Einar or Glaser or McKinney?

A. I don't remember hearing the names but probably I did because he mentioned names occasionally, but he didn't tell me those people were buying my property, any of those names that you are talking about.

Q. When did you first hear the names?

A. Of Einar Glaser?

Q. Yes.

A. When a realty man—after Bob Errion had

(Testimony of Marguerite L. Connell.)

refused, had not sold my property, and I was disgusted—the fact that this man didn't show up who was to have bought it. I began trying to sell it here, because it was expensive, and I was alone, so I put it in the hands again of a realty company, and a young man who I had known for years said he would try to sell it for me. He goes down to the recording office, and he comes back and tells me that there is a mortgage on my place, which was the first I ever heard the name of Einar Glaser.

Q. That was the first time? [12]

A. That I knew of. That is the first time I have any memory of it.

Q. That is when you had, when you went down—strike that, Miss Reporter.

Counsel, would you care to say something?

Q. (By Mr. Kobin): Mrs. Connell, I am going to refer to a deposition which you gave before Glen W. Walston, a notary public, and an official court reporter in this state and county, on the 23rd day of February, 1954, and this was a deposition of Mrs. Connell that was taken of you by Mr. Wayne Wright who was representing Mr. and Mrs. Glaser.

A. What year was that?

Q. 1954. A. Yes. All right.

Q. I will ask you, Mrs. Connell, whether or not you recall the following questions being put to you and the following responses made:

“Question: And did either Mr. or Mrs. Holdorf or Mr. or Mrs. Errion ever make any representa-

(Testimony of Marguerite L. Connell.)

tions at all with respect to Dorothy Glaser and Einar Glaser, Mrs. Connell?

Answer: No, except this. I heard Bob Errion say that he was handling a big logging business, that there were 55 heirs, and among them was a man by the name of Einar. I can't remember, but it must have been a man by [13] the name of McKinney, and he mentioned some others.

Question: When was that?

Answer: Oh, in 1950 or in early 1951."

Now, do you recall that testimony, Mrs. Connell?

A. If you have a record there, it must be true. I don't remember.

Q. In other words, if the record here—the record is correct? A. Yes.

Q. Is that your answer?

A. (Nodding in affirmative.)

* * * * *

Q. (By Mr. Kobin): Now, Mrs. Connell, I also refer you to a deposition which was taken at the request of your attorney to perpetuate your testimony on Monday, July 23, 1956, at the offices of your attorney, Mr. William White in Portland, Oregon, before Clifford R. Waits, likewise a notary public and a court reporter residing in Portland in the County of Multnomah and State of Oregon.

Mr. White: This is one of the exhibits, isn't it?

Mr. Kobin: No.

Q. (By Mr. Kobin): And these are the questions, Mrs. Connell, that were put to you by your attorney, Mr. White, in this deposition. The ques-

(Testimony of Marguerite L. Connell.)

tion Mr. White asked you—he was talking about this house——

“Question: What did Mr. Errion say to induce you to sign the note down there in Portland? What did he tell you?

Answer: He told me he would put it back in my name and sell it.

Question: Put what back in your name?

Answer: The house I live in. I said, “Why don’t you sell it and give me the 20 thousand I want,” and he said, “No, it would look better if they get it from an individual person,” and he said, “You will pay me 16 thousand, and I will get you 20.”

Question: Did he say anything as to whether or not he had a buyer?

Answer: Yes, certainly.

Question: What did he say?

Answer: He said this man was a wealthy logger, and his grandfather had bought all of this property many, many years before, and his two older sons were ready for [15] the University. They wanted to go to the University of Washington, and he had a family of six children, I remembered the number, and the others would go to some high school and some grammar school, and he said, “He wants a property that will take care of the family, and they can go to the school if they want to,” and I said, “Why don’t they buy it from you,” and he said, “It will be better if they buy it from you.”

Question: Did he say who the man was?

(Testimony of Marguerite L. Connell.)

Answer: I suppose he did, but I don't remember. I know it was a man with a lot of interest in logging.

Question: Did you understand he was going to try to sell the property or had a buyer?

Answer: He said he had a buyer, and it would be consummated in two or three months at the very longest, and I would have to vacate. I said, "Give me two or three months. I don't want to move and put my own back out." He said no, he won't. "I will make it go."

Question: Did he say if he was straightening out his business deal?

Answer: Yes, he was straightening out his affairs and all the heirs. I think one had not signed."

Now, do you recall that testimony that you gave in response?

A. I don't recall that testimony, but that is true. [16]

Q. Mrs. Connell, the home that you have, it's a large-type home, is it not?

A. What's the question?

Q. It's a real big house, this house that is involved here?

A. Supposed to have 27 rooms if you want to know, and they didn't count bathrooms.

Q. Mrs. Connell, were you collecting antiques at the time?

Mr. White: Your Honor, pardon me——

A. May I tell you that I haven't collected an antique in 15 or 20 years.

(Testimony of Marguerite L. Connell.)

Q. (By Mr. Kobin): But you have antiques at the house?

A. I lived in China nearly 40 years, and I collected over there.

Q. Getting back to this \$20,000, did Mr. Errion present you with any papers to sign, Mrs. Connell, when he was starting this transaction to sell this house for you and get the \$20,000 for you?

A. I am supposed to say yes or no, aren't I?

Q. You can, Mrs. Connell. Go ahead and respond the way it would be most comfortable for you.

A. For Mr. Errion I suppose I have signed, I don't know—I think maybe it's exaggeration—a thousand papers, but certainly hundreds. He did everything in triplicate, sometimes in quadruplet and sometimes in quintuplets.

Q. And did you have a discussion with him immediately [17] prior to this transaction being closed whereby you were going to get your property back, and then he was going to sell it, and you were going to get \$20,000? A. Yes.

Q. Now, what did he tell you about that, Mrs. Connell?

A. I can't say yes or no to that, can I? I am instructed to say yes or no?

Q. I am not going to restrict you to yes or no answers, Mrs. Connell. You just go right ahead and answer, as I say, in the manner which would be most comfortable.

A. I was still trying to get some money because

(Testimony of Marguerite L. Connell.)

I had found a house that suited my purpose here, so I called long distance to him, and I was after him so much that he was pretty peeved about it. Finally he called me, and he said, "Come on down. Get the train, and we will meet you, and we will try to arrange about that \$20,000," so I said, "All right," and I went, and they took me to their office down there. There were four, five people around, a secretary, and old Mr. Davenport who was ready to put a stamp on something, and anyhow they had a lot of papers around, and I suppose I did—anyway, he volunteered to take care of this property, and I was to get it back in my name, and so he put this paper in front of me, and I said, "What does it mean?" I said, "You know I have no money. I can't pay for this \$16,000." [18] He was asking me to sign a note. I have always been afraid of notes that borrow an interest, six per cent, five or six per cent. I said, "You know I can't pay for this. Suppose something happens? This man doesn't buy this property." He said, "Oh, you have five years, but that shouldn't happen. It will be taken care of. Within two months, at least, you will have your money. Then you go on and buy this house." I said, "Why don't you sell it?" I think you have repeated that. I don't need to tell that over and over again—he said, "Because it would be better if it came from you as an individual," and I said, "Is there anything wrong about this thing?" He said, "No. This sort of thing is done every day by businessmen,"

(Testimony of Marguerite L. Connell.)

and after I had signed it, and they endorsed, or whatever it is, they stamped it. I had read it through, but I happened to glance at the date above which I hadn't paid any attention to, and it was dated one year before, and I made quite a fuss about that.

Q. What type of a fuss did you make about that predating of the note? A. Pardon.

Mr. Kobin: Strike that, Miss Reporter.

Q. (By Mr. Kobin): What fuss did you make about the predate?

A. Well, I didn't think it was right in the first place. I [19] would be paying interest. If anything happened to that—I had a little sense. I didn't have much. I had enough to know I might have to pay this interest. I didn't see why I should pay a whole year's interest when I hadn't the thing in my hand until this moment which was in '51, I think. He had dated it back to '50, and I made a howl about it.

Q. What did he tell you when you made quite a howl?

A. He said it will be all through in three months anyway and wouldn't be any interest about that. It was kind of a lulling situation. I know it now but didn't know it then.

Q. What did he tell you, Mrs. Connell, about whether or not it would be better to represent to the party that was going to buy your house that the note was a year old?

A. Oh, he said that maybe it would be better

(Testimony of Marguerite L. Connell.)

to—this maybe would look better. I realized then—afterwards, thinking it over, that it was—that was premeditated, but he didn't give me that impression then.

Q. Well, so that we have no misunderstanding, you did realize, Mrs. Connell, that it was perhaps improper to sign this note when it was predated when you knew that he was going to sell your house to some party, and you were going to get \$20,000? A. Yes.

Q. And he was going to get 16 out of the deal which was this [20] note? A. Yes.

Q. But you went ahead, the transaction was consummated anyway? A. I was what?

Q. The transaction was consummated anyway?

A. Yes. I was concerned about the date, a year behind.

Q. It was right there at the office that day?

A. Yes, but I didn't see it until it was all done.

Q. Until, you mean, you signed it?

A. I had signed it, and it was all stamped and finished.

Q. The note was still there in the office, was it not?

A. Yes. They were hurrying me to catch a plane. They were going to take me to catch my plane.

Q. Mr. Errion did explain to you, did he not, this was the method of getting you \$20,000 for your house? A. Yes.

Q. And he was going—

(Testimony of Marguerite L. Connell.)

A. That was the object of the whole thing.

Q. He was going to sell your house for you and give you \$20,000? A. Yes.

Q. You never got the 20, did you? A. No.

Q. Pardon? A. I did not. [21]

Q. And Mr. Glaser paid Mr. Errion the \$16,000——

* * * * *

Q. (By Mr. Kobin): I think you stated—you did state, Mrs. Connell, that you had been continuously bothering Mr. Errion about money prior to this time and that many of his promises had failed to come about. Also, did you have another problem with Mr. Errion in March of 1951 relative to tax returns that he was supposed to prepare for you? A. What's that?

Q. Was Mr. Errion supposed to prepare income tax returns for you in March of 1951?

A. Well, I asked him to report whatever is the usual thing about that. He said I didn't have, and why should I bother. I made him make it out anyway.

Q. Prior to July of 1951, Mrs. Connell, you had these many meetings with Mr. Errion about getting your money and [22] these other matters. Were you beginning to have some suspicions about that time about Mr. Errion?

A. Yes, when he didn't pay what he had promised to.

Q. And you were getting rather suspicious about him, weren't you?

(Testimony of Marguerite L. Connell.)

A. Yes, in '51, '52, along there.

Q. Mrs. Connell, prior to July of 1951 when you executed these instruments, had Mr. Errion in order to appease your demands asked you to sign a purported lease with a man named Williamson?

A. Pardon?

* * * * *

Q. (By Mr. Kobin): Did you sign a lease with a man by the name of Williamson?

A. I did.

Q. In 1950? That was in 1950?

A. Yes.

Q. And did Williamson come about to be a cheat and a fraud also and just one of the Errion bunch?

A. Absolutely, yes.

Q. Did Mr. Errion at the time you signed that lease, Mrs. Connell, represent to you that you could borrow money on [23] that lease?

A. Yes. Everytime I tried to get money from him, he would say, "Don't worry about that. You can always borrow money."

Q. Excuse me, prior to July of 1951, then, when you executed this note, did you attempt to borrow money on the Williamson lease?

A. Yes.

Q. Were you able to borrow money on the Williamson lease?

A. I was not.

Q. Did you tell that to Mr. Errion?

A. Definitely, yes.

Q. And you were upset about that also, were you not, Mrs. Connell?

A. I was.

Q. Pardon?

A. I was.

Q. And you expressed that to Mr. Errion?

A. Yes.

(Testimony of Marguerite L. Connell.)

Q. And that was prior to July of 1951?

A. Yes.

Q. Mrs. Connell, I believe you testified that you raised quite a commotion at the time the note was executed when you found out that it was predated. You told Mr. Errion that you didn't have the \$16,000 that you might be [24] required to pay if the deal didn't go through, is that correct?

A. Yes.

Q. Now, I am going to again refer, Mrs. Connell, to the testimony that you gave on July 23, 1956, in the offices of your attorney in Portland to perpetuate your testimony in this case. These questions were put to you by myself, and you gave the responses, and I will ask you whether or not you recall these questions and the following responses:

“Question: You say when the note was signed and after you signed it, you saw the date was wrong?

Answer: Wrong.

Question: You read the note, didn't you?

Answer: I looked at the top, and I said, “Now, fashion”—that is the way we speak—I said, “Now, fashion, this is dated a year ago.” He said, “Oh, that must be a little mistake.” He said, “Leave it alone. It will be better if you had it for awhile.”

Question: Did he give you an explanation?

Answer: His explanation was that he didn't buy it from me.

(Testimony of Marguerite L. Connell.)

Question: You objected to signing the note originally, didn't you?

Answer: Yes, I did. [25]

Question: And then Mr. Errion told you, "Don't worry about it. I won't do a thing about it for five years," is that right?

Answer: That is true."

You remember that testimony?

A. I don't remember the testimony, but I think it's true.

Q. "Question: You knew at the time you executed this and because of that value, you were leary about signing this note. If this deal wasn't consummated, this man might come and talk you out of the house.

Answer: Which was possible."

Do you recall that?

A. What's that?

Q. I will again repeat. "Question: You knew at the time you executed this, and because of that value, you were leary about signing this note. If this deal wasn't consummated, this man might come in and talk you out of the house.

Answer: Which was possible."

Do you recall that?

A. I recall questioning if the deal—I didn't know any individual man. I never was sure at all what man this Bob Errion had in mind, because he was very reticent about mentioning any names, so that I didn't know McKinney's name or Einar Glaser's name in connection [26] with it at all.

(Testimony of Marguerite L. Connell.)

Q. All you knew, he represented the man as being somebody in the logging business?

A. Just some man who owned logging timber, and we didn't need to go into that. He talked that—talked me into buying, supposedly buying, the place for \$16,000, and then this wealthy man wanted to come here and live, and he would take it over, and I would get my \$20,000. That was the thing I was anxious about.

Q. I will ask you whether or not you recall these questions and the responses. I am again referring to the perpetuation testimony taken in your attorney's office in Portland.

“Question: You did know if you signed this note you might get kicked out of your house afterwards if the deal didn't materialize?”

Answer: Naturally. I have a horror of being left on the street.”

Do you recall that testimony.

A. I don't recall it but that is true.

Q. “What explanation did he give you to ask you to sign the \$16,000 note?”

Answer: It was his way of getting me the 20 thousand that I was bothering about.”

A. That is true. [27]

Q. “Question: And you got the title back on the property?”

Answer: Yes.”

Do you recall that testimony?

A. What was the last sentence?

(Testimony of Marguerite L. Connell.)

Q. "It was his way of getting me the \$20,000 that I was bothering about.

Question: And you got the title back on the property?

Answer: Yes."

A. Yes.

Q. Mrs. Connell, I don't think it's necessary to go all into these representations that Errion made, but he made a bunch of representations generally about what a businessman he was. He was an engineer, connected with the tax people and handled all kinds of deals all over the country. He would make you more money, investing your money and so forth. That is generally what he told you?

A. Yes.

Q. Now, when he was talking to you, Mrs. Connell, about the oyster property, did he encourage or discourage you to go down to Coos Bay and take a look at it?

A. He encouraged me. [28]

* * * * *

Q. (By Mr. Kobin): Did you go down?

A. I did. After I had broken with him, and I couldn't—I didn't know much more when I went than before I went.

Q. Mr. Errion, as a matter of fact, told you that perhaps you better not go down and upset the apple cart?

A. Yes, he did. He said that.

Q. And did you inquire of Dr. Kincaid who was connected with the University of Washington as to whether you should or should not go into this deal with Mr. Errion?

A. Yes.

(Testimony of Marguerite L. Connell.)

Q. And did Dr. Kincaid tell you that he had some transactions with Mr. Errion, and he thought that Mr. Errion was not an honest man, that you shouldn't go in with him? A. Yes.

Q. That was before you went into these transactions? A. I was already into it.

Q. You were already into it? A. Yes.

Q. But that was before July of 1951 when you signed this note, wasn't it? [29]

A. Yes, I guess—yes.

Q. When Lee Davenport told you about Mr. Errion, did he tell you, Mrs. Connell, that Errion was a good salesman, he could sell a snowball in Hades? A. Something to that effect.

Q. Was that the expression he used?

A. Something of that kind he told me. That is way back at the beginning.

Q. I am sorry——

A. That is way back at the beginning.

Q. Yes, right at the beginning. Mrs. Connell, did you introduce Mrs. Skene to Mr. Errion?

A. Unfortunately, yes.

Q. And was that about the same time that you first met Mr. Errion?

A. Oh, some months, probably two or three months later.

Q. Was that on a social occasion, or did Mr. Errion request that you introduce her?

A. It was a social occasion.

Q. And Mrs. Skene resides in Mason County?

A. Pardon?

(Testimony of Marguerite L. Connell.)

Q. Mrs. Skene resides in Mason County?

A. Yes, but she and her husband were in as my guests.

Q. Was Mr. Skene alive at the time?

A. He was. [30]

Q. You know, Mrs. Connell, whether or not Mrs. Skene was defrauded by Mr. Errion also?

A. I do.

Q. You also know that Errion's bunch including Holdorf got title to her property, don't you? You know that, do you? [31]

* * * * *

Q. (By Mr. Kobin): Mrs. Connell, do you know whether Mr. Glaser of your own knowledge gave Mr. Errion or Mr. Holdorf \$25,000 for a mortgage on the Skene property?

A. I do not know.

Mr. White: Just a minute——

The Court: She has answered. She does [32] not know.

Q. (By Mr. Kobin): Were you in constant contact with Mrs. Skene, or did you see Mrs. Skene between 1949 and 1951, Mrs. Connell?

A. Oh, yes.

Q. And did you discuss Errion with her from time to time?

A. Occasionally. We were social friends.

Q. You knew—you had compared notes, had you not, about what Mr. Errion was doing for the two of you?

* * * * *

(Testimony of Marguerite L. Connell.)

A. May I explain that I didn't know that Errion was going to bother the Skenes or have anything to do financially with them until I learned he had gotten their address two or three weeks after he met them at our house, or possibly two weeks, and went over there and saw them. I had nothing to do with that transaction.

Q. (By Mr. Kobin): When did you find out that Mr. Errion had gone down to see them?

A. What's that?

Q. When did you find out that Mr. Errion had gone down to see the Skenes?

A. Oh, possibly a month later.

Q. And you knew, as you have testified, that Mrs. Skene [33] entered into a transaction with Mr. Errion also? A. She told me, yes.

Q. And did you discuss with Mrs. Skene the transactions that she had with Mr. Errion?

A. May I say something besides yes?

Q. Sure.

A. I told her to go on her own, that I didn't want to be responsible for anything or anybody that he got any money from, and I was not meaning that I was suspicious of him, but I just felt—I don't recommend a dressmaker to people because they may not like my dressmaker.

Q. Did you discuss with Mrs. Skene the transaction that she had with Mr. Errion?

A. A month later. A month or so later she talked about it.

(Testimony of Marguerite L. Connell.)

Q. And did she know or did you discuss with her the transaction involving your house?

Mr. White: Your Honor, I object to this——

A. I don't think so. [34]

* * * * *

Q. (By Mr. Kobin): I will again, Mrs. Connell, refer to the perpetuation of testimony that you gave in your attorney's office in Portland in 1956, and ask you if you recall these questions and the responses. The question asked was this, "That is what I am getting at. He told you that unless he made this transaction with you or transaction of this nature to establish values, he couldn't begin to get as much money from the Port of Coos Bay as he could if he had this transaction?"

Answer: It was not only me, myself, but two or three other people.

Question: Two or three other people there?

Answer: There were two or three other people that were going to take land.

Question: Who else?

Answer: Mr. and Mrs. Skene.

Question: Had you known Mr. and Mrs. Skene?

Answer: Yes, for years.

Question: Had you introduced Mr. Errion to them?

Answer: I believe I did. They were at my house, and the Errions blew in, and they met them, and, of course, Bob Errion is a very clever salesman.

Question: Did you discuss this transaction with [35] the Skenes?

(Testimony of Marguerite L. Connell.)

Answer: Yes. They discussed it, and went over a few days later and sold their 25 some-odd acres of land on Lake—what—oh dear, I don't remember."

Would you say that those facts are true?

A. Yes, I think so.

Q. Mrs. Connell, would this be a proper statement to make, that Mr. Errion had you sign so many papers that it's very difficult to remember what date you signed any one paper?

A. Certainly.

Q. One of the representations made to you to induce you to deed the property to him including the whole property in 1949 was that the Port of Coos Bay was going to condemn, is that correct?

A. A few words I did not get.

Q. All right. I say one of the representations that Mr. Errion made to you in 1949 was that the Port of Coos Bay was going to condemn this property, and when the property was condemned, you would get your money? A. Yes.

Q. And in 1950, as I understand, Mr. Errion informed you that the Port of Coos Bay had dropped their desire to condemn?

A. In what year? [36]

Q. In 1950? A. That's right.

Q. Is that correct?

A. In Los Angeles, yes.

Q. You were in Los Angeles then?

A. I was.

Q. At whose request?

A. Well, Bob Errion's, I guess.

(Testimony of Marguerite L. Connell.)

Q. I have used the name of Bob Errion having contacted you on many occasions and having done certain things. Do you know Dwight Holdorf?

A. I do.

Q. Was he right along with Mr. Errion on just about every one of his contacts with you?

A. He was his chauffeur and his secretary, I suppose.

Q. Did he deliver papers to you for Mr. Errion?

A. Oh, at times, I guess so. I never signed papers—my papers were always signed before Bob, and he was there also, generally.

Q. He was there, generally, too?

A. But he wasn't in Los Angeles.

Q. I see. Was Dwight Holdorf—did he cheat you also? A. Did he what?

Q. Did he cheat you?

A. I didn't look upon Dwight—he was just a handyman. [37] That is the way I thought of Dwight, a nice young fellow who was trying to make a living.

Q. You had no idea that he was a cheater or fraud? A. Was a what?

Q. Was a cheat. A. No.

Q. Or a fraud.

A. I still don't think he is or was.

Q. I will ask you, Mrs. Connell, whether you recall giving some testimony by deposition before Glen Walston, an official court reporter, residing in King County, Washington, on September 10, 1955, in a deposition in the case entitled, "In the District

(Testimony of Marguerite L. Connell.)

Court of the United States for the District of Oregon.”

A. Pardon me, where was that?

Q. This was in Seattle. The deposition was given in Seattle, and it was given on September 10, 1955, and I will ask you whether or not the facts as developed by the following questions and answers are true. I will refer you to your houses in Seattle.

“Question: Did you sell those to him or to some corporation?

Answer: I thought I was selling them to him, but I had found out they were put in this Holdorf Corporation. [38]

Question: The Holdorf Corporation?

Answer: Yes, sir.

Question: Did Mr. Holdorf participate in that transaction?

Answer: Always, yes.

Question: He always participated right along with Errion?

Answer: I always thought of him — at first I thought of him as just a chauffeur. Then I thought he was, well, a secretary, and afterwards Bob Errion called him a business partner.

Question: You eventually came to the conclusion that he was a confidant of Mr. Errion, didn't you?

Answer: Oh, yes. It was borne out not too long after.

Question: It wasn't too long after that that you found out, is that correct?

Answer: That is right.”

(Testimony of Marguerite L. Connell.)

Are those facts developed from the questions and answers true?

A. Well, they were the best I probably knew at the time, but I never did take the young fellow seriously. I asked, "Why that name for this corporation," I asked Bob Errion, and he said, "Well, I had to have some name. That was just as good as any." [39]

Q. Did Mr. Holdorf ever sign any papers that you know of involving any business transactions that you were engaged in?

A. I suppose he must have.

Q. You knew, did you not, Mrs. Connell, that Mr. Holdorf executed a deed when the property in Seattle was deeded back to you in July of 1951? You knew that, did you not?

A. Executed what?

Q. The deed, when the property, your property here in Seattle, was deeded back to you in 1951. You knew he signed the deed?

A. Three or four people signed. Of course, the one person I thought that had any money or responsibility was Bob Errion, and he manipulated these things—I don't know.

Q. Well, you got the impression there that Mr. Holdorf was Errion's servant and doing whatever Mr. Errion told him to do? A. Yes.

Q. Is that a fair statement? A. Yes.

Q. I will ask you whether or not the facts that developed from these questions and answers are true:

(Testimony of Marguerite L. Connell.)

“Question: Mr. Holdorf participated in that [40] scheme with you, did he?

Answer: He was always in it.”

Is that correct?

A. May I divert a minute? It was correct because Bob Errion couldn't see to drive his car. He had to have a chauffeur. He was the chauffeur.

Q. Is that what you meant by your testimony when you said Dwight Holdorf was always in it?

A. Yes.

Q. Pardon? A. Yes.

Q. That is what you meant?

A. That is what I thought.

Q. Yes.

* * * * *

Q. (By Mr. Kobin): Mrs. Connell, I am going to refer to the deposition which you gave on September 10, 1955, in Seattle in Mr. McLeod's office, and ask you whether or not the facts as developed by the following questions [41] and answers are true.

“Question: Did you meet Mr. C. W. Williamson?

Answer: I did, early in 1951.

Question: Mr. Errion referred to Mr. Williamson as being a man of considerable wealth and influence, is that correct?

Answer: He did.

Question: And you eventually determined that that was not correct, did you not?

Answer: Of course, it came out that way.

(Testimony of Marguerite L. Connell.)

Question: You found that out yourself, didn't you?

Answer: Yes. Well, I didn't find out. I found out that he never could send me any checks unless he got them through Bob Errion or Dwight Holdorf.

Question: So that you then knew that Mr. Errion, Mr. Holdorf and Mr. Williamson was practicing some type of scheme of fraud upon you, did you not?

Answer: I did after possibly 1950. Well, I came to that definite conclusion in 1952.

Question: So, at least by 1952, you knew pretty well the type of individual Mr. Errion was and the type that Mr. Holdorf was and the type that Mr. Williamson was?

Answer: Well, a woman with no more experience than [42] I should never have had anything to do with that kind of people, but it gradually came to me they were scamps and scoundrels.

Question: And that you were being taken?

Answer: That is right."

Are the facts that are brought out by those questions and answers true, Mrs. Connell?

A. Yes.

Q. The following questions, "Question: Did Mr. Holdorf represent to you at any time that Mr. Errion or himself were experienced in business and financial matters?

Answer: Well, he, Mr. Holdorf, simply bore out everything that Bob Errion suggested, and by that

(Testimony of Marguerite L. Connell.)
time I did know he was considered a partner of Bob Errion's.

Question: So that by January of 1951, at least, you had absolutely no reason to doubt but that Mr. Holdorf was also a cheat and a fraud?

Answer: Yes. Yes, the whole crowd together. I rarely saw Bob Errion unless I saw Holdorf because he drove him everywhere."

Is that a true statement of the facts?

A. To the best of my knowledge, yes.

Q. "Did Mr. Holdorf participate in that transaction?

Answer: Yes, he was right there.

Question: He was right there, and he knew all [43] about what was going on?

Answer: Yes, definitely."

Is that a correct statement of the facts?

A. I think so.

Q. (Reading) "In other words, when you refer to the handwritings, the fact that you recognized those handwritings, it is because those are the handwritings of these two frauds?

Answer: Yes, absolutely."

* * * * *

Q. (By Mr. Kobin): We are talking about the note or purported note that predicated—that your cross complaint is based on.

Mr. White: The \$20,000 we are suing on.

The Court: Be sure that Mrs. Connell understands it.

Mr. Kobin: Yes.

(Testimony of Marguerite L. Connell.)

Q. (By Mr. Kobin): Mrs. Connell, let me put this to you, and I think you will get the background. I am going to hand you this note, Mrs. Connell, and I am going to ask you to look at the signatures and the purported [44] endorsements which appear on the back of the note. Do you have any knowledge of the time when that note was endorsed? [45]

* * * * *

Q. (By Mr. Kobin): This is the note, Mrs. Connell, that I handed you, and I showed you these endorsements.

A. That looks like their writing in both cases.

Q. All right. Now, with that thought in mind at the time these questions were being asked of you, I had shown you a—exhibited to you the endorsements on that note, the answer that you gave to the question was, “No, I haven’t, but I recognize both of those handwritings. I have had a number of examples of that.

Question: In other words, when you refer to the handwritings, the fact that you recognized those handwritings, it is because those are the handwritings of those two frauds?

Answer: Yes, absolutely.

Question: Dwight Holdorf and C. W. Williamson?

Answer: Yes.

Question: And you know that they are frauds, don’t you, Mrs. Connell?

Answer: Yes. I certainly ought to by now.

(Testimony of Marguerite L. Connell.)

Question: And you knew that they were frauds long before you took this note?

Answer: Yes, this note.

Question: Yes. You took that note, apparently, in July of 1955?

Answer: Oh, yes, before that, but I don't know [46] when it was that this note was executed."

Now, would you say that those facts are true?

A. I think I follow you. This note—what was this note?

The Court: The substance of the question, if I understand it correctly, Mrs. Connell, is simply this: Prior to the time that you got this \$20,000 note that you are suing on in the case here—do you have that note in mind?

The Witness: May I say, your Honor, it wasn't \$20,000. It is \$16,000 plus interest.

Mr. White: She shifted to another note.

The Court: Please let me talk to the lady just a moment.

We are talking about the note that you are claiming on.

The Witness: Oh, yes.

The Court: In the case, Mrs. Connell.

The Witness: I was going back to my house.

The Court: I know. That is what I am trying to do, get you oriented, talking about that note you are suing on, that is the \$20,000.

The Witness: Yes.

The Court: Now, the purport of this line of

(Testimony of Marguerite L. Connell.)

questioning is, that before you got that note—by the way, when did you get the \$20,000 note? [47]

The Witness: Have I ever had that note?

Mr. Kobin: To answer that response—

Mr. White: I think it will show July of 1955.

The Court: July of 1955 your counsel says.

The Witness: Yes.

The Court: Is the time when you got that note?

The Witness: We are trying to check—

The Court: Yes. Now, the question that Mr. Kobin is putting to you is this: Before you got that note, the \$20,000 note—

The Witness: Yes.

The Court: Before that time, you already knew that Errion and this other fellow Holdorf were crooks.

The Witness: Certainly, before '55.

The Court: Yes. That is the purport of the question. Go ahead.

Q. (By Mr. Kobin): Mrs. Connell, of course, by the record which is admitted in this case in the Federal Court case and also in the Seattle Court case, you sued Mr. Holdorf also and charged him with participating in the fraud?

A. His name with one of a dozen, I think, that were submitted. [48]

Q. And you are pretty-well satisfied that Mr. Holdorf, based upon this line of questioning, had actively participated with Mr. Errion as a conspirator with him, did you not?

(Testimony of Marguerite L. Connell.)

A. I suppose so, but he certainly wasn't in a class with Errion.

Q. Mr. Errion is a clam——

A. He is the Number One man, and the rest are all——

Q. Parties? A. Yes.

Q. Now, the first time that you heard about Mr. Glaser, as I understand it, was when Mr. Errion represented that he was handling a logging venture for he and his partner?

Mr. White: Object to that as misstating the testimony that is here.

A. That certainly is not so.

The Court: Put a question to her. Even though you would be entitled to lead under the circumstances, it will be more valuable if you don't lead unless it is necessary.

Mr. Kobin: Thank you, your Honor.

Q. (By Mr. Kobin): Did Mr. Errion represent to you—let me ask you this question again; it might be repetitious. I will ask if these facts are not correct. This is [49] quoting from your deposition taken on February 23, 1954.

“Question: And did either Mr. or Mrs. Holdorf or Mr. and Mrs. Errion make any representations at all with respect to Dorothy and Einar Glaser?

Answer: No, except this. I heard Bob say that he was handling a big logging business, that there were 55 heirs, and among them was a man by the name of Einar. I can't remember, but it must

(Testimony of Marguerite L. Connell.)

have been a man by the name of McKinney, and he mentioned some others.

Question: When was that?

Answer: Oh, in 1950 or early in 1951.

Question: But you never have met either of the Glasers?

Answer: No. In fact, I didn't know they had anything to do with it until I was going to sell the property later, and I asked if I could, and Bob Errion said——"

And then Mr. White interrupted, so we didn't continue with your answer.

Now, aren't those facts true, Mrs. Connell?

A. Yes, the facts are true, that I never heard of the Errions until—at least, I don't remember hearing of them.

Mr. White: Did you mean Glasers instead of Errions? [50]

The Witness: I mean Glasers, pardon me.

Q. (By Mr. Kobin): May I, Mrs. Connell, if possible—— * * * * *

Q. (By Mr. Kobin): I asked if those facts were true.

The Court: Put the matter to her again, the substance, without——

Q. (By Mr. Kobin): You heard Bob Errion sometime in 1950 or 1951 state that he was handling a big logging business for a man named Errion—a man named Einar and a man named McKinney, that there were 55 heirs involved, did you not?

A. Yes, but may I explain?

(Testimony of Marguerite L. Connell.)

Q. Surely.

A. I did not associate it with when I saw the name on—when I didn't see it, but my man reported it. Then it brought back a little memory. I remembered hearing Bob mention that man's name, but he did not say that a man by the name of Glaser or a man by the name of McKinney was the man he referred to who were going to buy my place—never was informed of anything of that kind. Their names did not come in to my knowledge. [51]

Q. In other words, what your testimony is is that Mr. Errion prior to the time that he represented that he would sell the home to you for \$20,000 had mentioned the name of Einar to you but not in connection with the purchase of your home?

A. Oh, it was mentioned in connection with ten or fifteen other people whom he wanted to impress me with.

Q. I see. In other words, Mr. Errion as one of his schemes would brag about people that he was doing business with? A. He did.

Q. I will ask you whether or not these facts are correct. Mr. White was questioning you, Mrs. Connell, relative to the same Glaser matter—whether or not these facts are correct. You said as follows: "Well, there were 55 people in that, they told me in this mess. The Glasers, I remember those two names. I don't remember the Glasers, but I do remember Einar and I remember McKinney, but I

(Testimony of Marguerite L. Connell.)

don't remember the other names, but they said there was 55 people in that."

By Mr. White: "You further allege in your second defense that Plaintiffs herein, meaning the Glasers, were actively engaged in defrauding other widows of their life savings and were never possessed of the net worth of a million dollars or any substantial funds. [52]

What other widows were they defrauding?

Answer: There was Mrs. Plamondon.

Question: How did the Glasers defraud her?

Answer: I don't know anything about the Glasers.

Question: Do you know the Glasers didn't have anything to do with any other widows?

Answer: I don't know the Glasers.

Question: You don't know anything about them?

Answer: Except that I—after I had learned in 1952 or '53 that they had a mortgage on my house. That is the first time I knew they had anything to do with anything of mine."

Do you recall that?

A. I do.

Q. Did you say that?

A. I don't recall that, but that is a fact.

Q. That is a fact.

Mr. Kobin: That's all.

Cross Examination

Q. (By Mr. White): Mrs. Connell, the first time you knew of the name "Einar Glaser" or the

(Testimony of Marguerite L. Connell.)

fact that there was a mortgage on your property was when this real estate man who [53] had looked up the title, this Seattle real estate man, had mentioned it to you, is that right?

A. That's right.

Q. When did that occur, to the best of your recollection?

A. It must have been the very latter part of '52 or early in '53.

Q. I see.

A. Because I got disgusted and started to try to sell the place.

Q. All right. Now, during all of this time from 1949 to the present, you have been in possession and have lived in this house at 2812 Mt. St. Helen's Place?

A. I have.

Q. And at no time has, to your knowledge, at no time did you have any contact by letter, telephone or otherwise, with either Einar Glaser or Dorothy Glaser until you got a letter in December of 1953 demanding payment of this \$16,000 note, is that correct?

A. That's correct. After Bob Errion, I started my suit.

Q. Yes. A. Then that came.

Q. That was after you commenced your fraud suit in this court?

A. Yes.

Q. Against Glasers and Errion and others in late August, [54] 1953?

A. That's right.

Mr. White: That's all.

(Testimony of Marguerite L. Connell.)

The Court: That's all, Mrs. Connell. Step down, please.

Anything further?

Mr. Kobin: Yes, your Honor——

Mr. White: Could I just ask this witness for the record how old she is?

How old are you, Mrs. Connell?

The Witness: I will be 82 December 13th this year. [55]

* * * * *

EINAR GLASER

called as a witness on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Einar Glaser, G-l-a-s-e-r.

Direct Examination

Q. (By Mr. Kobin): Spell your first name.

A. E-i-n-a-r.

Q. Where do you live, Mr. Glaser?

A. I live at Jewell, Oregon.

Q. You are one of the plaintiffs in this case?

A. Yes.

Q. How old a man are you, Mr. Glaser?

A. Fifty-two.

Q. What was the extent of your schooling, Mr. Glaser? A. I finished the eighth grade.

Q. Where? [57] A. In Michigan.

Q. In a large or small community?

(Testimony of Einar Glaser.)

A. What?

Q. In what community?

A. It was a little farm school between Brighton and Howell, Michigan.

Q. Prior to 1949 — I will strike that. Prior to 1951, Mr. Glaser, in what business were you?

A. I was in the logging business with a partner, Mr. McKinney.

Q. How long had you been in the logging business, Mr. Glaser?

A. I had been associated as a partner since January of 1948.

Q. Prior to that time, what?

A. Well, I had worked with Mr. McKinney starting in 1940, and I was gone for a couple of years, and then I came back in 1942 and operated a cat and also ran the job for him.

Q. In the logging business, were you in the office part of the time, or did you handle the field end of it?

A. I was on the production end, superintendent of operations.

Q. Did you have anything to do with the office end of the operation? A. Very little.

Q. Where were your operations, Mr. Glaser, in 1951? [58]

A. In the Cook Creek area, Tillamook County.

Q. Oregon? A. Oregon, yes.

Q. And how long had you been in that particular area? A. Started about 1942.

Q. Are you married, Mr. Glaser?

(Testimony of Einar Glaser.)

A. Yes, I am.

Q. And your wife is Dorothy, and she is a co-plaintiff with you? A. Yes.

Q. How long have you and Mrs. Glaser been married?

A. I believe it's—I am not sure. It's about 13 years.

Q. Do you have a family? A. No.

Q. When did you have the unfortunate experience of meeting Mr. Errion?

A. I met him in the early part of April of 1951.

Q. And who introduced you to him?

A. My partner, Mr. McKinney. We were on a trip to Portland to meet the people of a Portland manufacturing company regarding a contemplated sale of our property.

Q. Had you and Mr. McKinney or Mr. McKinney and you—how ever you would choose, been rather successful in building up a pretty good business?

A. Yes. We had a property at that time—we had a sales [59] price on it of around a million three or four hundred thousand dollars. It was the culmination of several years of hard work.

Q. On both your part and Mr.—

A. On both of our parts.

Q. Now, immediately prior to the time that you met Mr. Errion, say in the latter part of 1950, Mr. Glaser, where did you and Dorothy make your home?

A. We resided at Jewell, Oregon, but we had

(Testimony of Einar Glaser.)

only moved other, I think, in the early part of 1950. Prior to that time we lived up on the job on Cook Creek.

Q. For how many years did you live on the job at Cook Creek?

A. We had been up there, I suppose, about four or five years. Prior to that, we lived in Wheeler—or not Wheeler, but Nehalem, Oregon, which wasn't too far from the job.

Q. Was that just a logging camp you lived in?

A. Just. We called it Snag Valley. It was three or four little houses there.

Q. Did you come into town?

A. Not any more than necessary.

Q. Who transacted the actual business for the company?

A. Mr. McKinney took care of all of that.

Q. You were on the production end?

A. I was on the production end, on the job when we were [60] operating a crew. I met the busses at a quarter to 7 every morning and lined up the work for the day, and I was constantly up and down the road on the job.

Q. Mr. Glaser, getting back to your meeting Mr. Errion, you were introduced to Mr. Errion by your partner? A. Yes.

Q. Did it eventually come about that Mr. Errion got a listing on your partnership properties from both you and Mr. McKinney? A. Yes.

Q. To sell your lumber business, is that right?

A. Yes. The original deal fell through in the

(Testimony of Einar Glaser.)

latter part of May with this other company, and we had another real estate agent at that time.

Q. Just answer this question yes or no, Mr. Glaser. Did Mr. McKinney after he introduced you to Mr. Errion tell you anything about Mr. Errion's background? Answer that yes or no.

A. Yes, he did.

Q. You, Mr. Glaser, have been involved in litigation involving Mr. Errion and his gang, as it were, and you have heard the various charges and read of the various charges of fraud and the misrepresentations that Errion made to you—to other people relative to his capacities and abilities? You can answer that yes or no. [61]

* * * * *

Q. (By Mr. Kobin): What representations did Mr. Errion make to you?

* * * * *

The Witness: May I have the question?

The Court: What representations did Errion make to you concerning his background and experience, his business, business abilities?

The Witness: Well, most of the conversations had taken place with Mr. McKinney and Mr. Errion, [62] and Mr. McKinney reported to me or told me——

The Court: You are not permitted to tell what Mr. McKinney said to you, but you can tell us what Errion said concerning his background.

The Witness: Well, the impression I got——

The Court: That won't do, either, Mr. Glaser.

(Testimony of Einar Glaser.)

You have got to confine yourself to the question. Now, we will all save time if you do that. Just answer it. If you can't answer the question, just say so. You see?

Q. (By Mr. Kobin): What did Errion say to you?

A. He was a tax man, an investment broker, a real estate broker at the present time and handled deals that involved a lot of money.

Q. Did he make any statement to you about any connections with people?

A. There were various names mentioned—Scaggs Grocery, Doe—he knew the Does, or one of them, had met them in Seattle, and, oh, just too numerous for me to remember.

Q. Now, did these discussions with Mr. Errion take place prior to June of 1951?

A. Some of them, yes.

Q. In reliance upon the statements that were made by Mr. Errion and by your partner, Mr. McKinney, did you then [63] give Mr. Errion a listing to sell your partnership holdings in Tillamook County?

A. Yes.

Q. Did you in fact do so, Mr. Glaser?

A. Yes.

Q. What did Mr. Errion in June of 1951 represent to you that he was doing? Did he come down and visit you, first of all?

A. Yes. He appeared on the scene in the evenings, usually around the time that I would arrive

(Testimony of Einar Glaser.)

home, and he would set and talk and just generally—I would say now he was feeling his way.

Q. That is on reflection?

A. That is on reflection, yes.

Q. And you and Mrs. Glaser would be home then? She would be there? A. Yes.

Q. And would anybody be along with him?

A. Mr. Dwight Holdorf.

Q. How often would you say, Mr. Glaser, did he come down to your home to talk to you prior to June, 1951?

A. I couldn't remember the exact number of times.

Q. Let me ask you this: Would you say it was often? A. Fairly.

Q. Fairly often? [64] A. Yes.

Q. Well, maybe this will help you. Do you remember the Skene transaction? A. Yes.

Q. When did that take place?

A. Sometime in June, I believe.

Q. Of 1951? A. Yes.

Q. Mr. Glaser, did you at my request check your records to find out when the Skene transaction actually took place?

A. Yes. Up until last week I was under the impression that it had taken place at a later date, but I have been involved in so much litigation, have so many papers in so many attorneys' offices, that I have my records all scattered out, so you called it to my attention that the original deal on

(Testimony of Einar Glaser.)

the Skene property had taken place, I believe it was in June.

Q. Of 1951? A. '51.

Q. How did that come about? [65]

* * * * *

Q. (By Mr. Kobin): Now, prior to the Skene transaction, which is in June of 1951, had Mr. Errion visited with you quite often?

A. Frequently.

Q. Yes, and he had made these representations to you about what background he had?

A. Yes.

Q. And had he also represented to you, made any representations to you relative to what he was doing in order to put your business deal together?

A. Yes. Part of it hinged on the — we were in danger of a lawsuit from this Portland manufacturing company deal which had fallen through, and one of the conditions, as I remember it, was that he would take care of that and straighten it out for us.

Q. And did he ever inform you prior to June of 1951 that he was temporarily out of funds?

A. Yes. There was some mention made of it, that he had a [66] lot of property, but he was a little short.

Q. He was a little short? A. Yes.

Q. What, if anything, took place between you and Mr. Errion, Mr. Glaser, involving this Skene property—and Mr. Holdorf. Let's add him to it.

A. I don't remember too clearly, but—

(Testimony of Einar Glaser.)

Q. Let me ask you this, Mr. Glaser. Did you eventually loan either Mr. Errion or Mr. Holdorf or somebody \$25,000 on the Skene—on a note and mortgage on the Skene property? A. Yes.

Q. In June of 1951?

A. I loaned them an original amount of \$5,000 on it, and later in October gave them the balance.

Q. Are you sure of those dates, Mr. Glaser?

A. Not too sure.

Q. All right, but your recollection is that you eventually loaned them \$25,000 on that property?

A. Yes.

Q. All right. Why?

A. Well, at the time Mr. Errion was going to handle the property, the sale of our property, and he was short of money and wanted a loan, so I told him that—well, I would probably have a little money, but I would have to [67] have some security for it, and then he produced this Skene note and mortgage.

Q. That was with Holdorf, was it?

A. With Holdorf and Errion.

Q. By that time had he pretty well sold you on himself?

A. Yes. He had made a good appearance and a pleasing personality and seemed very sincere in what he was doing. He was going to help us, and we were faced somewhat with some tax problems then which he was going to take care of.

Q. Now, when did the what turned out to be the Connell matter come about on this, Mr. Glaser?

(Testimony of Einar Glaser.)

A. That was, I believe, in August.

Q. Of what year? A. 1951.

Q. All right. What did he tell you about that?

A. Well, he was right in the middle then of the sale of our properties, and he was pressed for money. He had some obligations he had to meet, and he had this property in Seattle which was very good, and he would like to pledge a note and the mortgage for the face amount, which I thought was all right, and subsequently we did.

Q. May I ask you, Mr. Glaser, if whether during the period between June and August Mr. Errion was continuously in [68] contact with you during that time? A. Off and on, yes.

Q. Well, by off and on, you mean what?

A. He would come in again in the evenings when I came home, after I came home from the job.

The Court: Well, roughly how frequently was it, once a week or once a month?

The Witness: It would be once a week. Some weeks it might be twice a week. Sometimes it would be three times a week.

Q. (By Mr. Kobin): Would you know when to expect him? A. No, never did.

Q. When he came, what would he tell you he had been doing?

A. He had been working hard with the Portland Manufacturing Company and contacted these people in Washington who were a syndicate or something that were going to buy our properties, and——

(Testimony of Einar Glaser.)

Q. Did he represent to you that he was working with a syndicate in Washington that was going to buy your properties? A. Yes, he did.

Q. What else did he tell you?

A. Oh, the name of the man, by the name of Mr. Buell as a representative of this syndicate, and we had heard in the meantime that—through another source that he was [69] looking at some property over the mountain from us in which we had a little holding, so when the name of Buell came up in connection with Mr. Errion, why, it seemed a logical—it seemed like he was a logical buyer.

Q. It turned out that Buell—

Mr. White: Object to that as a leading question.

Q. (By Mr. Kobin): At the time that you—strike that. [70]

* * * * *

Q. (By Mr. Kobin): After you became involved with Mr. Errion on the Skene matter, when, if you recall, did he next start talking about needing money?

A. Oh, it was probably two or three weeks or a month later.

Q. And how did it come about if you recall?

A. Well, of course, by that time he knew I wanted some security— [83]

* * * * *

Q. (By Mr. Kobin): Let me ask this question. Did he tell you he needed money? A. Yes.

Q. After the Skene money?

(Testimony of Einar Glaser.)

A. Yes. He said he needed money, that he had this property in Seattle.

Q. Did he tell you why he needed the money?

A. No, not particularly. He said he was short.

Q. Did he tell you why he was short?

A. Well, he was spending so much time on our affairs trying to make this sale.

Q. What was he doing on your affairs at that time in July of 1951?

* * * * *

Q. (By Mr. Kobin): What was he doing that you know, not what he said, Mr. Glaser?

A. He was taking care of the Portland manufacturing matter [84] and meeting with Mr. Buell.

Q. Now, what did he tell you he was doing about your transaction at that time?

A. I can't recall any exact instance, but he was very busy on it.

Q. Did he say something about negotiating a deal with a syndicate?

* * * * *

Q. (By Mr. Kobin): What did he tell you about—strike that. Did he tell you he was trying to sell your business?

A. Yes. We had signed a listing, a real estate listing, the 7th of June.

Q. By "we", you mean whom?

A. My partner and I, Mr. McKinney, and he was working on the sale of the property.

Q. What was the listing price?

(Testimony of Einar Glaser.)

A. To the best of my knowledge, I believe it was a million three hundred thousand.

Q. During that time, that is, during July of 1951, did he tell you—now, this requires just a yes or no answer—did he tell you how he was trying to arrange the sale? [85]

A. Yes.

Q. What did he tell you about that?

A. Well, he had represented this syndicate of which Mr. Buell was the head. They were from Washington—Seattle, and he was going to work out a sale with them.

Q. What other discussions did you have with him about the methods that he was using in handling the sale?

A. I didn't have very many regarding that.

Q. What did you have discussions with him about?

A. Just general things as they developed.

Q. How often would you say during July of 1951 did you see Mr. Errion?

A. Oh, I couldn't say. It would be off and on. Sometimes I wouldn't see him for a week or two. Then he would show up two, three days in a row.

Q. Everytime he showed up, did he discuss with you what he was doing?

A. Not specifically. Generally.

Q. What did he come for?

A. I think—I know now what he came for. He was feeding us a line.

Q. What did he talk about when he came, Mr. Glaser? [86]

* * * * *

(Testimony of Einar Glaser.)

Q. (By Mr. Kobin): Did he invite you to dinner at his house? A. Yes.

Q. Did you invite him to dinner at your house?

A. Yes, he always came about dinnertime. Naturally, we invited him.

Q. Did he talk to you about organizing a corporation of any kind in July of 1951 to take over your business?

A. No. No, he didn't talk to me about that, but in a general way he was talking about co-ops.

Q. Did you eventually give him \$16,000 and in return receive the note, the mortgage and the assignment of mortgage from Mrs. Connell?

A. Yes.

Q. At the time that you gave him this \$16,000, Mr. Glaser, did you have any reason to doubt Mr. Errion?

A. No. He had made a good impression upon me, and he had my confidence.

Q. Did you know Mrs. Connell?

A. No, I didn't. [87]

Q. Did he mention Mrs. Connell to you?

A. Yes. I remember something about him mentioning to my wife when he visited us, we had a few antiques in the house, and he mentioned to my wife about this woman in Seattle. Now, I couldn't say specifically that was Mrs. Connell who had a big house that was filled with antiques, and——

Q. And did he tell you—excuse me.

A. If my wife would visit up there, he would take her up there, why, she would give her anything that she took a fancy to.

(Testimony of Einar Glaser.)

Q. Did he tell you that this was this woman's house that you would have the security on?

A. No.

Q. Did you ask him at that time, Mr. Glaser, what the security was?

A. Yes, what type of a building it was and where it was located.

Q. Did you have a credit report run on Mrs. Connell?

A. No, I didn't.

Q. Did you have a title search run made?

A. No, for the reason that I trusted Mr. Errion.

Q. Did Mr. Errion at any time previous to your giving him that \$16,000 tell you how he happened to get this note and mortgage from Mrs. Connell? [88]

A. No.

The Court: Did you ask him?

The Witness: No, I didn't.

Q. (By Mr. Kobin): Why?

A. Well, I had confidence in him, and it seems very foolish at this date, but I just took his word for it. He had made such a good impression.

The Court: What was his word? What was his explanation of how he came to have this note and mortgage?

The Witness: I have the impression that it was through some of his dealings here in Seattle. That's to the best of my knowledge, that's all I can say.

Q. (By Mr. Kobin): That he previously told you that he had been doing business in Washington?

A. Yes, I had that distinct impression, that he

(Testimony of Einar Glaser.)

had just recently moved to Oregon. He had been in business up here for quite some length of time.

Q. Did he tell you that he had this security before you gave him the money?

A. Yes. He described it as a very valuable piece of property and that he didn't want me to let go of it, that at the first opportunity, why, he wanted to get it back; also, that I could borrow money on it from [89] the Sun Life Insurance Company, I believe, if I needed to.

Q. He told you you could borrow money on this mortgage from Sun Life? A. Yes.

Q. And that is the Connell mortgage we are talking about here? A. Yes.

Q. Now, did you get the note, Mr. Glaser, at the time that you gave him the balance of the monies?

A. Yes.

Q. And have you had it in your possession ever since up until this litigation started?

A. It's been in mine and my attorney's possession.

Q. Was the assignment recorded? A. Yes.

Q. How was the assignment—how did you cause the assignment to be recorded, if you recall?

A. Mr. Holdorf was coming down with Mr. Errion on these trips—

Q. Coming down from where?

A. From Portland to our home at Jewell, and in their conversations there was—Mr. Errion was always talking about Dwight having to go to Seattle or just coming back, and so he volunteered to

(Testimony of Einar Glaser.)

take the mortgages up to Seattle and record them for us, which we did. [90]

Q. I see. The assignment of the mortgage was returned to you, was it? A. Yes.

Q. And you had it in your possession?

A. Yes.

Q. Was Dwight Holdorf present at most of these conversations with Mr. Errion?

A. Yes, he was.

Q. Did he participate in these conversations?

A. Not too actively. Occasionally he would. Most of the time he was setting back and listening, and he would volunteer information from time to time, whatever the subject was.

Q. And was he present at the time of this transaction, these transactions were being put together—strike that. Was he present at the time you had your conversations with Mr. Errion relative to the Connell mortgage and also at the time the money was exchanged? A. Yes.

Q. The checks were made payable to whom, if you recall?

A. To Dwight Holdorf, I believe.

Q. You believe? A. Yes.

Q. Did Mr. Errion ever tell you in what capacity Mr. Holdorf—strike that. Did Mr. Errion ever discuss Mr. [91] Holdorf's business relationships with him in your presence?

A. Not directly, except that he had set Mr. Holdorf up with this Holdorf Oyster Corporation. It was a—I got the impression that it was a little com-

(Testimony of Einar Glaser.)

pany of Mr. Holdorf's. Mr. Errion had set him up in this, and he was making some money with it.

Q. Did he tell you whether or not there was any blood relationship which existed?

A. Yes. I have the distinct impression that he told me one time that Dwight Holdorf was his nephew.

Q. When you used the word "impression", do you mean you have the recollection that he told you? A. Or recollection, yes.

Q. Mr. Glaser, after some period of time, you caught onto Errion, is that correct?

* * * * *

Q. (By Mr. Kobin): In the fall of 1952, did Mr. Errion present you with a contract that sort of shocked you?

A. Yes, he did. It was a document that started to open my eyes. I would say the contents of it were—in my language, that he wanted to trade these two notes and [92] mortgages for a lawsuit against my partner.

* * * * *

Q. (By Mr. Kobin): Did Mr. Errion ultimately, that is eventually, conclude a purported sale of your logging properties? Well, let me frame it a little simpler. Did Mr. Errion finally sell your logging interests?

A. We thought he did, yes. We received two notes and mortgages, my partner and I, from the McKinney Logging Corporation for \$575,000 apiece.

(Testimony of Einar Glaser.)

Q. And the McKinney Logging Corporation, who was that? [93]

* * * * *

Q. (By Mr. Kobin): Was that an Errion corporation?

* * * * *

The Witness: May I answer?

The Court: If you know. Do you know anything about it?

The Witness: All I know is what appeared at the time on the notes and mortgages. Mr. Buell and Mr. Carr, Mr. Buell was the president and Mr. Carr was secretary-treasurer. Since then I know different, that it was an Errion corporation.

Mr. White: Move to strike that. It's calling for a conclusion.

The Court: Well, I don't know. He said since then he knows.

Q. (By Mr. Kobin): How do you know? [94]

A. Through various lawsuits that everybody filed in the State of Washington.

Q. Were you present at the time of the trial of the issues? A. Some of them, yes.

Q. Did you hear the testimony? A. Yes.

* * * * *

Q. (By Mr. Kobin): Were those sales eventually rescinded? A. Yes.

Q. When did you——

The Court: Did you get your property back, then, in the rescission?

(Testimony of Einar Glaser.)

The Witness: Yes, my partner did, took possession of it.

Q. (By Mr. Kobin): And you then settled your differences with your partner?

A. Yes, later. [95]

Q. When did you first consult with an attorney with respect to this note and mortgage?

A. I believe it was in 1953. At about the time that we were served on this Federal Court case by Mrs. Connell, we had. We were beginning to get apprehensive about it, and I consulted, or my wife did, rather, Mr. Wendell Wyatt in Astoria. We were then referred to Mr. Wayne Wright up here in Seattle.

Q. Do you know whether or not Mrs. Glaser prior to your consulting Wayne Wright discussed the note with Mr. Errion? A. Yes, she did.

Q. Were you present at those conversations?

A. I was present, but I wasn't paying too much attention.

Mr. Kobin: I have nothing further, your Honor.

The Court: Cross examination. [96]

Cross Examination

Q. (By Mr. White): Mr. Glaser, in reference to this \$16,000 note, you had the transaction in reference to this note with Mr. Errion, didn't you?

A. Yes, Mr. Errion and Mr. Holdorf.

Q. But you had the transaction with only Mr. Errion, is that not right?

A. He was the principal, yes.

(Testimony of Einar Glaser.)

Q. In other words, Mr. Errion did all the talking, but the money went to Mr. Holdorf?

A. Yes.

Q. Or the Holdorf Oyster Corporation?

A. Yes.

The Court: What person did you hand the money to? Did you make it out in a check, or how was the money paid?

Mr. Kobin: We can help the Court. We have the checks.

The Witness: It was in cashier's checks, your Honor.

The Court: Payable to the Holdorf Oyster Corporation?

The Witness: Yes.

The Court: Who did you hand the checks to?

The Witness: Mr. Holdorf to the best of my recollection.

The Court: All right, go ahead.

Q. (By Mr. White): Isn't this what happened; Mr. Errion had a conversation with you and said he wanted some money, isn't that right?

A. Yes, he said he needed some money.

Q. And didn't Mr. Errion give you the note?

A. Possibly, but I couldn't recollect for sure. I would say that Mr. Holdorf and Mr. Errion were together.

Q. Well, isn't it a fact that Mr. Holdorf—isn't this right, isn't this what happened—Mr. Errion wanted to borrow some money from you, and eventually at some time or other gave you the promis-

(Testimony of Einar Glaser.)

sory note but later or at another occasion, Mr. Dwight Holdorf went down to Jewell and handed to you only the assignment of mortgage at which time you gave Mr. Holdorf the seven 500-dollar checks and that other check for 12,5? Isn't that what happened?

A. It could be possible.

Q. Yes. A. I wouldn't swear to it. [98]

* * * * *

Q. (By Mr. White): Do you know whether Mr. Errion gave you the note or not? Who handed you the note? A. At this late date——

Q. You don't know? A. Couldn't recollect.

Q. I see. Do you know who handed you the assignment of mortgage?

A. I would say Mr. Holdorf as you described it. It seems reasonable.

Q. Yes. Now, at the time he handed the assignment of mortgage—he didn't hand you the mortgage, though, did he?

A. Whatever paper we have, he gave me.

Q. Well, the only thing you have is a photostatic copy of a mortgage that was recorded. Isn't that your——

Mr. Kobin: That is the exhibit. We are not——

The Witness: We had the original, I thought.

Q. (By Mr. White): Well, you don't have the original now, do you?

A. Must be in my attorney's possession.

Mr. White: Do you have the original? [99]

Mr. Kobin: We are making a check.

(Testimony of Einar Glaser.)

Mr. White: I see. Thank you.

Q. (By Mr. White): At the time, Mr. Glaser, it was at Errion's suggestion that you took this note, wasn't it? Isn't that right?

A. I don't follow you.

Q. Well, he wanted some money, and you lent him this money, and it was at his suggestion that you took the note? A. Yes.

Q. And at that time you didn't pay any attention to it, did you?

A. I thought it was good security. I trusted him.

Q. At that time, at the time of this transaction and in reference to the note, you didn't pay any attention to it, did you? You were busy, weren't you? A. I was very busy, yes.

The Court: The question is, did you pay any attention to it or did you just rely wholly on Errion without giving any thought or attention to it at all?

The Witness: It appeared on its surface good to me, and I relied upon Mr. Errion's judgment and good faith.

The Court: His statements about it?

The Witness: His statements about it. [100]

The Court: All right. Go ahead.

Q. (By Mr. White): Is it true that you didn't pay much attention to it?

A. Yes, in that respect.

Q. And at the time you didn't go—in reference to this promissory note, this transaction for \$16,000, you didn't go into—Errion didn't tell you where he had gotten the note, did he? A. No.

(Testimony of Einar Glaser.)

Q. And you didn't go into that matter with him, did you? A. No.

Q. And you made no inquiry of him as to whether he had paid any money for it, did you?

A. No. I had no reason to.

Q. I see.

A. I trusted him, and it appeared good.

Q. But you didn't make any inquiry about how he had gotten it or whether he had paid anything for it, did you? A. No.

Q. Now, at that time, this is in August of '51, Mr. Glaser, at that time you didn't actually know the relationship between Holdorf and Errion, but you assumed that there was some kind of a relationship between them, didn't you?

A. I remembered distinctly Mr. Errion saying something [101] about Dwight, that he had trained him, that he was a nephew.

Q. Now, there was nothing said as to how—when Mr. Errion—this was a loan of money to Mr. Errion, wasn't it?

A. I considered it as such.

Q. Yes, and did you inquire at that time as to how you could pay money to Holdorf Oyster Corporation and loan money to Errion?

A. They were together, and by that time I assumed that they were associating—

The Court: But the question is, did you inquire?

The Witness: No, I didn't inquire.

Q. (By Mr. White): Now, at the time you took

(Testimony of Einar Glaser.)

this note, you were told the interest on it was past due, were you not?

A. There was some discussion on it. I don't recollect. My wife would have a better recollection on that.

Q. I see. I would like to refresh your memory if I may, Mr. Glaser. I am going to read your testimony from the first case when you sued on this note in the Superior Court, State of Washington for the County of King, No. 465340, where you testified—I am referring to Exhibit B, and this trial took place, to refresh your memory, on September 8 and September 9, 1954, and here is [102] what I am going to ask you if you didn't testify as follows, and you listen, and I will read it accurately to you.

“Question (Mr. White): Now, Mr. Glaser, you knew at the time that you acquired this note and mortgage, the interest was not paid, isn't that right, on the face of it?

The Court: The question was, did you know whether or not the interest was paid when you got this?

Answer: I think they told me, to the best of my memory, that the interest was due on it.”

Didn't you so testify?

A. Yes.

Q. And then again just shortly after that while you were on the stand, didn't you testify as follows—I was asking the question, “Question: At the time you got this note, you knew the interest was

(Testimony of Einar Glaser.)

not paid on it, it was delinquent, isn't that right?
You just said that, isn't that right?

Answer: That is right."

Did you so testify?

A. Yes.

Q. And isn't that a fact?

A. Yes, but I might add that Mr. Errion made a statement that he would take care of it. [103]

Q. All right. Now, you never looked at this property, did you, before you acquired this note and mortgage? A. No.

Q. Did you know where it was located?

A. General vicinity, yes.

Q. Did you know the address?

A. We had the address, I don't remember where.

Q. And did you know who was in possession of the property? A. No.

Q. Did you make any inquiry?

A. No, I didn't until a little later.

Q. Until sometime later. As you indicated, you never got a title report, did you? A. No.

Q. And you never made any—before you took this note and mortgage, Mr. Glaser, you made no inquiry whatsoever about the property before taking that note, did you?

A. No. I relied on Mr. Errion's good representations and the impression he had made on us.

The Court: There again, I know for lay people, they don't sometimes follow it closely, but it is important to answer the particular question.

(Testimony of Einar Glaser.)

You didn't even ask Errion these things about [104] the property, did you?

The Witness: He described it to me, and I accepted his description and his evaluation.

Q. (By Mr. White): You made no inquiry of anybody outside of what Mr. Errion told you about this property before you took the note, did you?

A. No.

Q. Now, at this time in August of '51, you had signed, had you not, an agreement to pay to Mr. Errion when he sold—strike that. I will start over again with a preliminary question.

In June, roughly in June of 1951, you and Mr. McKinney, your partner, had listed your holdings, your timber holdings, for sale to Mr. Errion to sell for you, right? A. Yes.

Q. And later but before August of 1951, before this note transaction, you had signed a written agreement to pay as commissions to Bob Errion for consummating this sale when and if he consummated it, commissions in the amount of approximately \$75,500, isn't that right? A. No.

Q. Did you sign such an agreement?

A. After the notes and mortgages were delivered to us—— [105] * * * * *

Q. (By Mr. White): Mr. Glaser, you weren't worried about getting your money back from Mr. Errion, this \$16,000 and the other 25 that you described you loaned to Mrs. Skene? You weren't worried in August about getting your money back, were you? A. No.

(Testimony of Einar Glaser.)

Q. And your primary concern or assurance that you were going to get your money was the fact that you had agreed to pay real estate commissions of \$75,500, and you knew that when you had to pay those, you could just deduct the \$40,000, isn't that correct? [106]

* * * * *

Q. (By Mr. White): Didn't you in September of 1951 tell your partner, Bart McKinney, that you had loaned \$40,000 to Errion? A. I may have.

Q. And didn't you also tell him you weren't worried about it because you were going to get your money back by deducting it when you paid Errion the \$75,500 commission?

A. I don't recollect any conversation with Mr. McKinney of that nature.

Q. Well, now, isn't it true, Mr. Glaser, that the reason you didn't pay attention to finding out who was on the property and all about this note transaction was that you were primarily relying on the fact that you would see that you got your \$40,000 at the time you paid Errion \$75,500 by just deducting it? Wasn't that in your mind?

A. That was in the back of my mind as a secondary——

Q. But—— [107]

* * * * *

The Witness: Shall we say as a secondary recovery.

Q. (By Mr. White): Well, at the time it was a primary recovery idea, wasn't it? A. No.

(Testimony of Einar Glaser.)

Q. Now, your deposition was taken, Mr. Glaser, in this case, Glaser versus Holdorf, in reference to the Skene property in the Superior Court in the State of Washington for the County of Mason and before a notary public, Kenneth M. Baker, on December 15, 1955, at 4 o'clock p.m. at the office of Kenneth H. Baker, court commissioner in Thurston County, Court House, Olympia, Washington. Do you remember appearing there and taking a deposition in which Mr. Byron McClanahan, who sits here, and Mr. Wayne Wright was present? A. Yes.

Q. Do you remember that? A. Yes.

Q. I am going to ask you if you didn't testify as follows at that time. I am reading from page 13 of the transcript. "Question: At the time of this note and mortgage"—now, this is referring to the Skene note in fairness to you, not this particular note—"At the [108] time of this note and mortgage, did you do any checking on Mr. Errion or Mr. Holdorf as to whether or not they were responsible people?"

Answer: I asked my partner if he had. He was spending all his time in Portland or the majority of it, and I was busy on the production end that occupied all my time. So I asked him. He said apparently as far as he could find out, they were all right. They must have been, because he was instrumental in starting the negotiations with them regarding the sale."

Pardon me, I read the wrong portion. Let me

(Testimony of Einar Glaser.)

read this again to you, and it's still referring to the Skene transaction, not this note, Mr. Glaser.

“Question: You said a moment ago that the way this matter has turned out that you wouldn't call this advancement of money and taking the notes and mortgage on the Mason County property as an investment. Would you say it was a loan of Mr. Holdorf?

Answer: My principal thought at that time was that I wanted to do everything possible to help them conclude the sale of our properties, and I think we were in some type of negotiations then, and if the sale was concluded, I would owe them a sizable commission, and I could offset it against the commission if they didn't pay. [109]

Question: Did you do that? Did you offset the money?

Answer: No, because the sale was never concluded. It was thrown into legal difficulties.”

Did you so testify?

A. Yes.

Q. Now, you never communicated with Mrs. Connell at all until you consulted—until December or thereabouts in 1953 after consulting with Mr. Wendell Wyatt and Mr. Wayne Wright, you caused a letter to be written demanding all of this money, isn't that right? A. Yes.

Q. And at the time you took this note you could have demanded the interest in default, and you could have accelerated and made the demand

(Testimony of Einar Glaser.)

the moment that you got the note, is that not correct?

A. You are way over my head. I am not that smart a businessman to know what you are talking about.

Q. I see. Well, Mr. Glaser, you were consulting other attorneys in this business transaction, Mr. Bill Prendergast in August of '53, were you not, June, July, August?

A. No, I didn't meet with Mr. Prendergast until—I believe it was October.

Q. Of '51? A. Of '51, yes. [110]

Q. Did you talk with any other attorneys in connection with this sale of your business properties in August of '51? A. Unfortunately, no.

Q. Isn't this true, at the time you—what brought about your consulting Mr. Wendell Wyatt and Mr. Wright about this note was the fact that you were served with summons in this Federal Court commenced by Mrs. Connell in August 28, 1953, involving—pardon. Withdraw that.

Isn't it a fact—I want to make this simple, and I am sorry, Mr. Glaser, isn't it a fact that before you consulted any attorneys or made any demand on Mrs. Connell for this money on the \$16,000 note, you had already been served with summons in a Federal Court action commenced by Mrs. Connell here in this court against you, Errion and Holdorf and the others? A. Yes.

Q. Isn't it a fact that that is what prompted you to make a demand for this money?

(Testimony of Einar Glaser.)

A. I became extremely apprehensive about how good it was. I really found out how bad we had been taken.

Q. And if that suit hadn't been filed and you hadn't been served, it would have been some time much later before you would have made any demand, isn't that right?

A. No. We were already consulting with Mr. Wyatt about it.

Q. I see. Isn't it a fact that as soon as you were served [111] in this Federal case, Number 3556, the case I just referred to, Mrs. Connell's suit, that you consulted with Mr. Errion about that suit? A. No.

Q. Isn't it a fact that you talked with Mr. Errion after being served about this note and mortgage?

A. My wife called him and read the riot act to him.

Q. And didn't he instruct—well, you never talked with him, is that what you are saying?

A. No.

Q. Do you have any recollection of Mr. Errion phoning you right after you had been served with summons in this Federal case, this 3556 case, and you and he discussing the situation and Mr. Errion telling you to sue on that \$16,000 note in retaliation?

A. The only recollection I have is that we were trying to put all the pressure we could on him by

(Testimony of Einar Glaser.)

words, and he said that he would have Mr. Holdorf come down and clear the matter up.

Q. Do you deny that Mr. Errion some time shortly after you were served with summons in the Federal case had a telephone conversation with you in which he told you to file suit on this note to retaliate against Mrs. Connell?

A. I don't recollect any. [112]

Q. I see. Now, you didn't purchase this note to invest in it but to loan money to Errion, isn't that correct? A. Yes.

Q. Weren't you holding it temporarily for Mr. Errion?

A. I wouldn't know how to answer that. Not holding it, I had money in it. I was going to hold it until I got my money out of it.

Q. But what you had in mind, isn't this right, that you were going to get your money back when you were paying commissions to Mr. Errion, and then at that time you would be transferring back these notes to him or whoever he told you to, these mortgages? A. I didn't get the last part.

Q. Isn't it a fact that you had every intention of getting your money by offsetting it against commissions and then assigning back this Connell mortgage to Mr. Errion?

A. If that materialized, yes.

Q. And the situation is that that was your state of mind when you went into your transaction, and since you couldn't get your money that way, that

(Testimony of Einar Glaser.)

you are now suing to get it this way from Mrs. Connell?

A. I would like to recover my money.

Q. You didn't even look at the endorsement when that note was handed to you, did you?

A. I looked at it, yes, and it appeared proper to me. [113]

* * * * *

Q. (By Mr. White): Do you have any recollection of ever actually, Mr. Glaser, seeing the original mortgage? I am not thinking of the photostat, the photostatic copy, but have you ever actually seen the original mortgage?

A. Well, if that is what Mr. Wright has, yes, because I delivered it to him, I believe.

Q. And if he hasn't got it, then the answer would be "No", wouldn't it? A. Yes.

Q. Your wife, Mr. Glaser, was a school teacher, wasn't she? A. Yes.

Q. And she has had a college education?

A. Yes.

Q. And you and she at this time in August of '51 were consulting each other in respect to these transactions, weren't you? A. Yes.

Q. And she knew along with you all about these matters, [114] did she not? A. Yes.

Q. You executed an agreement so far as you were concerned to pay Mr. Errion a commission for this sale, at least as far as your partnership interest was concerned of this timber land, did you not? A. Yes.

(Testimony of Einar Glaser.)

Q. When did you execute that?

A. Sometime in October.

Q. Of—— A. '51, 1951.

Q. Mr. Bart McKinney never executed such an agreement, did he?

A. That is what I understood.

Q. At the time this property was listed, it was listed without a provision to pay commissions?

A. I don't remember how the listing read.

Q. Well, the amount of these commissions, am I not right, was \$75,500? A. You may be right.

Q. Yes. A. I don't remember exactly.

Q. It was a substantial sum, was it not?

A. Yes.

Mr. White: I believe that's all, your Honor.

The Court: Redirect.

Redirect Examination

Q. (By Mr. Kobin): Did you hear from Mrs. Connell in 1952 or any time previous to that time?

A. No.

Mr. Kobin: That's all.

The Court: That's all, Mr. Glaser. Step down, please.

(Witness excused.)

The Court: Call another witness.

Mr. Kobin: We will call Mrs. Glaser.

DOROTHY BROCK GLASER

called as a witness on behalf of the Plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name.

The Witness: Dorothy Brock Glaser.

Direct Examination

Q. (By Mr. Kobin): Where do you live, Mrs. Glaser? A. Jewell, Oregon.

Q. There is one thing we better get straightened out. [116]

How long have you been married?

A. Fifteen years June 15 this year.

Q. Mrs. Glaser, how did you happen to meet Mr. Errion?

A. I met him through my husband.

Q. And where did you meet him?

A. At his home in Salem, Oak Grove Farm.

Q. Were you invited down there?

A. Yes. He asked my husband to bring me down.

Q. And did you at that time have any private discussions with him?

A. Yes, that afternoon.

Q. How did it come about?

A. There was a large group of people there, and as soon as the picnic lunch was over, he asked us into his office.

Q. By "us", you mean whom?

A. My husband and myself.

(Testimony of Dorothy Brock Glaser.)

Q. What did you discuss at that time, just briefly?

A. Oh, this listing that he was to have, and he talked some of how he would go about it, to sell the logging interests.

Q. Just generally what did he tell you at that time about himself?

A. Oh, that he was quite a horseman, and that he had all these prize-gaited horses out in the pasture, that he [117] had beautiful saddles, bridles and so forth. He talked a lot about that.

Q. Did he talk about any business transaction?

A. Yes. I can't recall, but the impression was definitely that he had been of great assistance to a great many people or large corporations. I believe there was something about buying a tract of timber, and about—I think he was supposed to have set up books for Safeway Stores or something like that. Those things still stay in my mind.

Q. Did you see him quite often between the time you first met him, Mrs. Glaser, and the first part of June of 1951?

A. Yes. It was quite often, I would say, more as a housewife than anything else, because my home was being disturbed all the time. In fact, I don't like to have guests running in unexpectedly.

Q. You were living down at Jewell?

A. At Jewell.

Q. Did Mr. Errion come down there very often?

A. He was there quite often and unexpectedly, he or Mr. Holdorf. If they weren't together, why,

(Testimony of Dorothy Brock Glaser.)

either Mr. Holdorf or Mr. Errion was there. We would see him three and four times a week.

Q. For what purpose? What did they tell you? What were [118] your conversations at the time?

A. Oh, he would bring little gifts, candy, such as that. I think more or less he was on fishing expeditions. He was trying to find out what we had.

Q. How did he go about doing it? What did he talk about? You can't testify as to what you think. You can't testify as to surmise. You can say what he said and what you told him.

A. I guess I am speaking in light of what I know now, but, oh, just general conversations. He was a very charming person, very well mannered.

Q. Did he talk about corporations?

A. Yes.

Q. What did he say about corporations?

A. Mostly about what he had done for different corporations.

Q. In what way?

A. He had solved their tax problems. He had set up their books in a different way so as to save them money.

Q. Did he talk about any syndicate of wealthy individuals who were going to buy your husband's business?

A. I don't think of the word "syndicate" so much as corporation. This, I can't tell when this began exactly, but the idea was he had a group of men—— [119]

Q. Did he tell you this?

A. Yes. He had a group of men that he was

(Testimony of Dorothy Brock Glaser.)

going to set up the corporation for them. They had wealth. Mr. Buell was backed by great wealth, but they had asked him to set up the corporation, and from what he had told me, I judged he was an expert on setting up corporations.

Q. Now, did Mr. Holdorf come down with him very often? A. Very often.

Q. Did these conversations take place before you gave him this money?

A. These conversations took place all through this time. Yes, before we gave him the money, after we gave him the money, all during this time.

Q. We are going to confine your testimony, then, Mrs. Glaser—to get along with the Connell transaction, just tell the Court what you know about the Connell transaction.

A. I dare say, I discussed the small points with Bob more than my husband did. He being man-like, it was just the big issues that interested him, but I being womanlike, I took in all the small points.

Q. What were the small points that you discussed?

A. He described the house to me. He also told me that it was in a very good residential district, and that [120] it had a great number of rooms, that Mrs. Connell had converted this house into apartments, but because of zoning regulations, she had had to do away with that, so I knew approximately the type of zone it was in and the type of house, the size.

(Testimony of Dorothy Brock Glaser.)

Q. Can you tell me whether or not he told you the owner was living in the house?

A. Yes, he did. He told me that she was living in the house.

Q. May I ask you this, Mrs. Glaser; before he started to approach you about getting some money on the Connell mortgage, did you have any discussion with him about getting the money?

A. Yes. He had said that his time was being taken up, and he had a lot of business of his own that he couldn't concentrate on that he had a lot of money in, but he had to make an effort to collect this money, and right now he didn't have time because he was working on our deal, and he was temporarily short of funds.

Q. Did he make—did you ask him anything about the security, Mrs. Glaser?

A. Well, when he came right down to it and asked us to loan him money, I said it was all right if we had good security.

Q. Now, did he describe the security to you after you had [121] asked him, or did he volunteer it? That is the question I asked, if you recall, Mrs. Glaser.

A. I think he had discussed Mrs. Connell's home with me before we were ever approached, that is, asked out and out for the 16,000.

Q. How did that come about?

A. I have several antiques at home, and he brought up the fact that Mrs. Connell had this home, and she had a room in the basement that

(Testimony of Dorothy Brock Glaser.)

was full of antiques mostly what she had collected in China, and he told me that he wanted me to meet her, and he said, "If you will go with me and if you will admire whatever you like, I am sure she will give it to you," and he suggested to me that she had a huge—it was carved grapes, something like that—I think it was grapes. Anyway, it was a carving. He said, "That is what you should really get," and I told Mr. Errion that I didn't want anything that was gotten that way.

Q. That was before he actually wrote up this mortgage on the home? A. Yes.

Q. Now, did he then subsequently discuss the home with you also?

A. Yes, he had described the home.

Q. What I am trying to find out, Mrs. Glaser—— [122] A. I don't know just when.

Q. Is whether or not he was talking about the same piece of property on both occasions.

A. To my recollection, that is the only piece of property he discussed in connection with her.

Q. I see. Now, did you have any discussion with Mr. Errion, if you recall, relative to the interest being past due, or did you on this note?

A. Yes, I did ask Mr. Errion that. He said that it started in from the day that we took the note. Now I understand why. He said there was——

Q. (Interrupting) What did he say to you?

A. That there was no interest due to us. Now I understand today, when they brought up about

(Testimony of Dorothy Brock Glaser.)

that predating of the note, of course, there was no interest due. * * * * *

Q. (By Mr. Kobin): Did you call Mr. Errion's attention to the interest at any time, Mrs. Glaser?

A. Many times.

Q. What was his response?

Mr. White: This is before the transaction?

The Witness: This is after. Many times [123] afterwards.

Q. (By Mr. Kobin): What was his response?

A. He told me that he would take care of it, that he would contact Mrs. Connell, that he knew how to handle her, and he spoke something about her age. Well, I will just let that go.

Q. Mrs. Glaser, did you make any inquiry of any other person about the security that you were getting?

A. I spoke to Wendall Wyatt in Astoria. He is an attorney.

Q. I am talking about before the transaction.

A. Before the transaction, no. As I recall, it was rushed through so that I wouldn't have known to whom to go, and at the time because of my husband and his partner's faith in Mr. Errion, their complete faith, I assumed that he was all right and believed he was honest and a good risk.

Q. I would like you to clear up one point, Mrs. Glaser, about the going to Wendall Wyatt. Who went to Wendall Wyatt and when was that?

A. I did. That was before we were served on the Connell case. Do you want me to tell—

(Testimony of Dorothy Brock Glaser.)

Q. Just briefly. Did you go to Wendall Wyatt?

A. Before, because by that time we didn't have too much cash, ready cash, and we had to begin to bring in the money that was owed us, so I went to Wendall about [124] checking the interest on these mortgages and notes. Then I don't think it was more than a week, if it was that long, when I received—I was served with the papers on the Connell case. I was home alone. I immediately took them into Mr. Prendergast because my husband—I believe that day was in town. I took them up and showed them to Mr. Prendergast, and I was sick, just sick at the whole thing, and he told me to contact Mr. Holdorf, so I tried to get Mr. Holdorf that day but I couldn't. I got ahold of Mr. Bob Errion. They were one and the same to me. I told Bob Errion to come downtown and meet me, and then I showed him this summons, and I said, "You are going to have to do something about this." I said, "You and Dwight know that we have nothing to do with this. Now, you do something and do it right away," and Bob said that he would get Dwight and send him down to Wendall, and he would have Dwight sign a release saying that we had absolutely no knowledge of fraud.

Q. Did you know anything about the transaction, Mrs. Glaser, between Mr. Errion and Mrs. Connell?

A. I did not. I supposed that he had obtained those honestly and ethically.

Mr. White: Move to strike——

(Testimony of Dorothy Brock Glaser.)

Q. (By Mr. Kobin): Did he ever tell you whether he had [125] obtained them honestly or dishonestly? A. No.

Q. Did he ever tell you that they were valid obligations? A. Yes.

Q. How did he tell you that? Did you talk to him about it?

A. Well, now, as I recall, he had received those mortgages in exchange for land, for an acreage.

Q. Did he tell you that?

A. Yes. He told me that he had obtained it—it was some land transaction, that she had received value for this mortgage that she had given to him.

Mr. White: This is after it? When is all this taking place, these conversations?

Mr. Kobin: The last I was referring to was prior to the transaction having been——

The Court: I am not sure the witness understood. I think the witness is talking about when the complaint was served, what his explanation was.

The Witness: I knew that it had been in exchange for land.

Q. (By Mr. Kobin): When did you know that?

A. I knew that when I talked to Mr. Errion.

Q. When? [126] A. About Mr. Holdorf.

Q. That was when you called him after the lawsuit was filed? A. Yes.

The Court: That is what I thought she said.

Mr. Kobin: I am sorry, but I misunderstood.

The Witness: Just a moment. Mr. Holdorf did come down.

(Testimony of Dorothy Brock Glaser.)

The Court: We are not interested in that.

Q. (By Mr. Kobin): That is immaterial.

A. O.K.

The Court: There is no criticism of you. This has nothing to do with this problem.

Mr. Kobin: That's all.

The Court: Cross-examination.

Cross Examination

Q. (By Mr. White): Mrs. Glaser, have you and your husband ever had money before on a mortgage to anybody? A. Yes.

Q. Ever borrowed any money on a mortgage?

A. You mean we have given——

The Court: You mean prior? [127]

The Witness: We have given mortgages in return for money you mean?

Q. (By Mr. White): Yes. A. Yes.

Q. With a bank, or whom do you deal with?

A. No, private people.

Q. Those people that took the mortgage, they *invested* the mortgage pretty thoroughly before they took your mortgage, didn't they?

A. No, Mr. White, they didn't have to.

Q. I see. Well, they knew you very well?

A. Because they know us very well.

Q. I see. At this time when your husband and you were taking this \$16,000 note from Mrs. Connell, you didn't know her at all, did you?

A. No, but I knew Mr. Errion. I thought I knew Mr. Errion.

(Testimony of Dorothy Brock Glaser.)

Q. All right. You didn't know Mrs. Connell at all? A. I didn't know Mrs. Connell, no.

Q. But you did know that she had some nice antiques?

A. Yes, which I was not interested in.

Q. Yes, and you did know that this mortgage was on her home? A. Yes.

Q. And you did know she was elderly?

A. Yes. [128]

Q. And you did know she was a widow?

A. Yes.

Q. And did it ever occur to you how she was going to pay this note to you let alone the interest that was overdue?

A. I understood that Mrs. Connell had property and that she had money. This was from Mr. Errion.

Q. Yes, but you didn't make any investigation yourself, did you?

A. I didn't feel that it was necessary. We had faith in Mr. Errion.

The Court: The point is that you didn't do it. That is the question.

The Witness: We didn't do it.

Q. (By Mr. White): You could have gotten on the telephone and had a chat with Mrs. Connell at that time, couldn't you?

A. I am not the chatting kind.

Q. The telephone is open. You know how to use it.

(Testimony of Dorothy Brock Glaser.)

A. Mr. White is trying to show that I haven't got good sense.

The Court: He isn't trying to do that at all. We have a serious problem in the case, Mrs. Glaser. Nobody is trying to cast any reflections on anyone. Go ahead. Put another question. [129]

Q. (By Mr. White): Why did you wait so long? You knew the interest was past due when you got the note, didn't you? A. No.

Q. Oh. Well, your husband—you didn't know that?

A. I didn't, no. I was given to understand by Mr. Errion that it wasn't, that it began from the time we got the note.

Q. In other words, you didn't read the note?

A. Yes, I read the note.

Q. Well—— A. This was six years ago.

Q. I know it may be difficult. If you read the note, you could see—did you read the note?

A. Yes, I have read the note. I have seen it and read it.

Q. And didn't it by its terms indicate that the annual payment of interest was past due?

A. I couldn't tell you the date of that note. It's due annually or semi-annually, isn't it?

Q. Why did you—why didn't you make demand for the interest on that note at the time that you took it?

A. Because there was no interest due us on that note. We had just bought it.

Q. I see.

(Testimony of Dorothy Brock Glaser.)

A. Our interest was to start from the date of our purchase. [130] Isn't that what is——

Q. (Interrupting) You were getting interest, you weren't paying interest. Mr. Errion didn't tell you the interest was paid on that note, did he?

A. I can't say that he definitely said that the interest was paid or that he would get the interest for himself. Now, one way or the other; as I said, it's been six years, and I cannot be positive, but there was no interest due us on that date.

Q. All right. Now, Mrs. Glaser, upon August, 1951, when this note transaction took place, you had only met Mr. Errion either 30 or 60 days before that, isn't that right?

A. May, June, July—I met Mr. Errion, I believe, in May.

Q. And just on that short acquaintance, when he asked you for some money, you gave him \$16,000, is that right?

A. He was asking at that time in August—he had already had the listing of a million——

* * * * *

The Witness: Yes, because in the meantime he had the signed listing for a million-dollar business, [131] and if my husband and his partner could trust him with a million-dollar business, why couldn't I go along on a \$16,000 loan?

Q. (By Mr. White): At that time he was going to have a commission coming to him, wasn't he?

A. Yes, that was understood.

Q. And you felt, did you not, that you were certainly getting your money back when you had to

(Testimony of Dorothy Brock Glaser.)

pay him the large commission, you could have just deducted what was owing on it?

A. Why, yes, Mr. White. Wouldn't you feel the same way?

Q. That's right. That is the primary reason you made this loan, isn't that right?

A. No, it is not. The primary reason was because of this security that we had.

Q. Well, now, Mrs. Glaser, you weren't concerned so much with this security as you were with the fact that you were going—when you had to pay Mr. Errion some money, you were going to deduct it, isn't that right?

A. Will you rephrase that question?

Q. You weren't concerned with this security that you are now talking about, this \$16,000 note and mortgage, as much as you were about the fact when this deal went through and you paid him some money, you could just deduct this and get your money back? [132]

A. The way I *put* that question, I can't say yes or no, but I can say this, that I was concerned about the security, the value of the security, to the point that not long afterward, I had the property evaluated. Now, I was told that it was in a good residential district, that it would well carry that \$16,000 mortgage, but in time it was running downhill, that the Negroes were coming in, and it wouldn't be long until the value wouldn't be there.

Q. That was right after this transaction?

A. That was shortly afterwards. I can't tell you just exactly.

(Testimony of Dorothy Brock Glaser.)

Q. Why did you and your husband wait two years and four months until you were sued before making a demand for the principal or the interest or both?

A. Mr. White, do you know what we went through during those two years?

The Court: Please don't argue with Mr. White. Why did you wait over two years before——

The Witness: We were in——

The Court: Answer the question.

The Witness: We were in court. We were being sued because of Mr. Errion. We didn't have time to sit down and do much of anything, and that is why we didn't. [133]

Q. (By Mr. White): Now, Mrs. Glaser, you and your husband had never sued Mr. Errion, had you?

A. No, but you know why, Mr. White, because there is no use in sending good money after bad.

Q. You and your husband, your partner, Mr. McKinney, sued Mr. Errion and had adjoined your husband as a—— [134]

* * * * *

DWIGHT HOLDORF

called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows: [151]

* * * * *

Cross Examination

Q. (By Mr. Kobin): How old are you?

A. 34 years old.

(Testimony of Dwight Holdorf.)

Q. 34. Are you the same Dwight Holdorf who has been associated with Mr. Errion for the past several years? A. I am.

Q. Are you the same Dwight Holdorf that Mrs. Connell testified relative to yesterday? [168]

A. I am.

Q. How many corporations were you an officer of? A. You want me——

Q. Approximately how many.

A. Oh, approximately eight or nine or more.

Q. You don't want this Court to believe that you were nothing more than Mr. Errion's messenger boy, do you, Mr. Holdorf?

A. I was strictly Mr. Errion's messenger boy. I was at his bidding. I was used as a dupe, as a fool, as a proxy in all of his work.

Q. For how many years did that go on for, Mr. Holdorf?

A. From 1949 until the time I got away from him.

Q. When was that, sir?

A. I started breaking away in '53, and the SEC suit came, and I made the final break completely in '54 right here in this Court with my own attorneys.

Q. In 1954. After all this litigation had been filed, the SEC and several lawsuits in which you were named as a party defendant, you then came into this court and admitted that you were—had perjured yourself previously, is that your testimony? A. In 1953?

(Testimony of Dwight Holdorf.)

Q. '54, sir. A. In '54 in this trial? [169]

Q. Yes. A. I certainly did.

Q. And you admitted that you had made, that you had given perjured statements in previous litigation?

A. In depositions I did. I told the Court the truth, and I am still telling the truth. I have got my own attorneys, and I am acting strictly on the advice from my attorneys.

Q. Now, Mr. Holdorf, you started to work for Mr. Errion in what part of 1949?

A. In the latter part of 1949.

Q. Did you meet Mrs. Connell through Mr. Errion? A. I did.

Q. Were you present at his conversations with Mrs. Connell?

A. I was present at some of the conversations but I wasn't present at all of them. Mr. Errion wouldn't leave you present at conversations when he didn't want you to know everything that was going on. In other words, with Mr. Errion, the left hand never knows what the right hand is doing. That is true for the people that are around him.

Q. Well, Mr. Holdorf, you want this Court also to believe that you didn't know what Mr. Errion had been doing for the four years that you were his so-called messenger [170] boy, is that right?

A. I am telling the truth, exactly what took place. I was used as a fool. I was used as a proxy. I was a dupe in the whole thing. Mr. Errion has

(Testimony of Dwight Holdorf.)

a very powerful, persuasive way. He can make you believe white is black and black is white, and I was simply used, and at that time I didn't fall to it until it was too late.

Q. Well, why didn't you, Mr. Holdorf?

A. For the simple reason Mr. Errion is a very powerful, persuasive man. He is a gentleman that can go on and even persuade attorneys to his way of thinking, and he is very clever at the way he does it, and I was a boy off the farm. I didn't know anything about corporations, notes, stocks or bonds. I had a lot of ambition. He preyed on my ambition, and I was the loser, and I didn't tumble to it until it was too late.

Q. Did you meet Mrs. Skene?

A. Yes, I did.

Q. And you knew Mr. Errion was using Mrs. Skene, didn't you?

A. No, not at that time.

Q. Well, did you take title to Mrs. Skene's property? A. I sure did.

Q. In your own name? [171] A. I did.

Q. Did you give Mr. Glaser a mortgage on that property in your name and your wife's name?

A. Yes, I did through the direction of Mr. Errion.

Q. Who got the money?

A. It came to me and went right to Mr. Errion.

Q. You didn't keep any of it?

A. No, it filtered right through my hands——

Q. (Interrupting) Whose bank——

* * * * *

(Testimony of Dwight Holdorf.)

Q. (By Mr. Kobin): Whose bank account did the money go into?

A. My bank account in Seattle First National Bank in Vancouver, Washington.

Q. And then you wrote the check to Mr. Errion, is that it?

A. I wrote checks out of that at Mr. Errion's—actually, the money in that bank account was Mr. Errion's money to be disbursed at Mr. Errion's discretion.

Q. You so did? A. I so did.

Q. Did you know what he had done with Mrs. Skene in order to get that property from her at that time? [172] A. No, I didn't at that time.

Q. Now, you said that he was—you were a stockholder in Pacific Properties?

A. I didn't say I was a stockholder in Pacific Properties.

Q. What were you in Pacific Properties?

A. I was just merely a figurehead in Pacific Properties as I was in all of his corporations.

Q. Was what?

A. I was just a figurehead. He used me as a figurehead.

Q. What do you mean by "figurehead"?

A. In other words, I was too green and too stupid to know what I was doing, and he used me, in other words, just as a name.

Q. He used your name? A. Yes, he did.

Q. And you signed papers?

(Testimony of Dwight Holdorf.)

A. I did lots of papers.

Q. That was the device whereby he was able to get monies from Mrs. Plamondon?

A. That's right. That is what it all turned out to be.

Q. Let me ask you whether Mr. Holdorf you were a party in a lawsuit that Mr. White filed for Mrs. Plamondon? A. Yes, I was.

Q. You were a defendant in that case?

A. I was. [173]

Q. That was back in what year?

A. That was back in 1950, I believe.

Q. Yes. Now, in 1950 you already had been sued by Mrs. Plamondon, Mr. White representing her, and in that case Mr. Errion and you were charged with fraud perpetrated upon Mrs. Plamondon?

A. That's correct. We were represented by Mr. Prendergast which was associated in his office in Portland, Mr. Kobin.

Q. I am glad you got that in. Mr. Holdorf, you want this Court to believe that despite the fact that in 1950 you had already been sued by Mrs. Plamondon where you were charged with fraud, that you didn't know in 1950—you were nothing more than a dupe? Is that what you want this Court to understand?

A. I do because that is what I was.

Q. You continued from 1950 up to 1954 to associate yourself with Mr. Errion?

A. I did. I was in the trap and in the web.

Q. You were in what trap, sir?

(Testimony of Dwight Holdorf.)

A. The trap that made the corporations that Mr. Errion could get you in.

Q. Just tell the Court the trap you were in.

A. Mr. Errion will organize a corporation. He will put you in as an officer and a director in that corporation. [174] He will take properties into it very smoothly like he did with Mrs. Connell and others. Your name is on all these papers going in and coming out. Then the money comes into the bank account. Mr. Errion has you write checks on these bank accounts siphoning this money out. At the time you are doing all of this, Mr. Errion has already got all of his stock to the company endorsed in blank, and he don't believe in keeping up any minute books, no resolutions, put in any tax returns or anything else. He has the stock endorsed in blank. Your name is on all of these papers. You are setting out there in the public just like a sore thumb. You had it.

Q. Did he do that prior to 1950 with Mrs. Plamondon?

A. It turned out—I didn't realize it in 1950, but it turned out the same program, the same thing that he used.

Q. That was the charges that were made in the complaint, was it not?

A. I don't remember the complaint. There was a complaint filed. It was turned in to Mr. Prendergast. I don't know who it was in it. I knew they charged fraud.

Q. Now, Mr. Holdorf, you knew, did you not,

(Testimony of Dwight Holdorf.)

that the Connell property was in the name of Dwight Holdorf?

A. In the beginning, if I remember correctly—the documents [175] would speak for themselves, but I believe that he first—the way he worked it, he had all the property transferred to my name to hold, the Holdorf Oyster Corporation, solely in my name to hold. Also the oyster property in Coos Bay was held in my name and transferred into the Holdorf Oyster Corporation.

Q. You knew what he was doing with Mrs. Connell, did you not?

A. At that time I did not realize what he was doing.

Q. You didn't know what he was doing?

A. I had full faith and confidence in him and his attorneys. After all, he hired me. He was going to teach me business, show me and guide me and direct me, and he gave me an awful selling.

Q. I see. In other words, he set you up as a director or as an officer of all these corporations. He permitted titles to properties to be taken in your name, requested that you execute many instruments for and on behalf of those corporations, permitted you to receive large amounts of monies in your name which you deposited to your bank account, and thereupon checked the money out to Mr. Errion, and all you were was a messenger boy and a dupe? A. That's right.

Q. You say—when was the Connell suit filed?

A. In 1953.

(Testimony of Dwight Holdorf.)

Q. And you were served in that case, were you not? A. Yes, I was.

Q. The Connell case, I mean.

A. The Connell case here in Seattle, yes, I was.

Q. Incidentally, did you have anything to do with Connell Industries? A. No, I didn't.

Q. I see. You were served in the Connell case in 1953? A. I was.

Q. When was Beaver Plywood Co-op organized? A. Pardon?

Q. When was Beaver Plywood Co-op organized?

A. It was organized in the spring of 1953.

Q. '53? A. Yes.

Q. How long did you continue in that corporation?

A. I was not an officer and director in Beaver Plywood. Mr. Errion had me in there as a salesman.

Q. Were you selling certificates in that corporation? A. I was.

Q. And you continued that up and to 1954?

A. No, sir, not in Beaver Plywood.

Q. In which co-op did you continue in?

A. In Beaver Plywood the certificate selling stopped when [177] the SEC had their investigation, and I remember I took the money that had come in the last couple of days of the sale of memberships, took it back and returned it, which I have got signed receipts for it, and the rest of the money that came into Beaver Plywood was handled by other people other than myself. I had nothing to do with it.

(Testimony of Dwight Holdorf.)

Q. You are under indictment now in the Beaver Plywood case in the Oregon District Federal Court, are you not? A. That is correct.

Q. You have been named as a party defendant in many of these lawsuits that have been filed against Mr. Glaser as a defrauder, haven't you, Mr. Holdorf?

A. I don't believe I have been named party defendant other than the one here in Seattle that Mrs. Connell filed from my recollection. I might have been, but I don't believe so.

Q. You were named party defendant in the Plamondon case?

* * * * *

A. Yes.

Q. (By Mr. Kobin): You were in the Plamondon case, weren't you? A. Yes.

Q. And many others? [178] A. Yes, sir.

Q. Thank you. Now, you talked about a fellow named Williamson. Did you know Mr. Williamson?

A. Yes, I did.

Q. Do you know that he was a so-called corporate officer along with you in National Forest Products? A. Yes.

Q. And did you know his background?

A. No, I didn't.

Q. You had no idea?

A. No, I don't. All I know that he worked for an oil company.

Q. Mr. Errion didn't tell you anything about him?

(Testimony of Dwight Holdorf.)

A. The only thing he told me, he built him up, that he worked for an oil company for many years—a good gentleman.

Q. Do you know that he represented to Mrs. Connell that Mr. Williamson was a wealthy lumberman?

A. I don't recall anything like that. I know he represented to her that he was a wealthy oilman, had been in the oil business for quite some years.

Q. Do you know that he represented to Mrs. Connell that he was going to sell her this Coos Bay property—sell him this Coos Bay property? [179]
* * * * *

Q. (By Mr. Kobin): Mr. Williamson, you said, was an officer along with you in National Forest Products and was the same party that Mr. Errion used in the Connell transaction?

A. Yes, he is.

Q. Did you do business with him?

A. At Mr. Errion's direction, yes, I did.

Q. Now, the National Forest Products Corporation was used by Mr. Errion to funnel monies belonging to McKinney Logging Corporation?

A. Yes, it was.

Q. Now, all the services that you performed for Mr. Errion, then, were performed in these many transactions which Mr. Errion had been engaged in between the years 1949 and 1953, is that correct?

A. That's right, all at Mr. Errion's direction.

Q. All at his direction? A. Yes.

(Testimony of Dwight Holdorf.)

Q. What part of the year 1953 did you receive this note? [180]

A. It was July, August or September of '53 when the heat was on. I don't remember the exact daytime or hour, but it was right in that time of the year.

Q. Was that before or after the Connell case had been filed?

A. I couldn't answer that question correctly because I don't have the date in my mind that the Connell case was filed, but I got the note. It was during that period of time.

Q. Do you know whether or not you received the note before or after you were served with the Connell summons?

A. I don't recall whether it was before or whether it was after. There was a lot of suits being filed, a lot of distress going on.

Q. Did you ever make demand upon Mr. Glaser for payment of that note?

A. No, I never did.

Q. Had you seen Mr. Glaser after you received the note?

A. I seen Mr. Glaser several times but had no occasion to talk about the note to him.

Q. You never told him you held the note?

A. No. We — there was too much litigation to talk to anybody.

Q. I see. Do you remember going down to see Mr. Wendell [181] Wyatt? A. Yes, I do.

Q. And Mr. Glaser's attorney? A. Yes.

(Testimony of Dwight Holdorf.)

Q. And were you forced to do that also?

A. Mr. Errion sent me down there.

Q. What did Mr. Errion tell you to do?

A. He told me to go down and get a corrective mortgage on the Skene property and at the same time sign whatever Mr. Wyatt and Mr. Glaser had drawn up for me to sign, which I did.

Q. And you signed it without equivocation?

A. I did.

Q. Did the statement that you signed before Mr. Wyatt, was it a false statement?

A. Pardon?

Q. Was the statement that you signed before Mr. Wyatt a false statement?

A. You mean as far as I was concerned?

Q. Yes, or anybody else.

A. I never paid that much attention to the statement.

Q. You don't know what was in the statement?

A. I don't recall, no.

Q. You recall whether or not—incidentally, Mr. Wyatt is an attorney, is he not? [182]

A. That's right.

Q. And he is associated with Mr. A. W. Norblatt in Astoria, Oregon, is that correct?

A. I don't know, but I know Mr. Wyatt is from Astoria.

Q. He was representing Glasers in the fall of 1953, was he not?

A. I believe so. Anyhow, Glasers—Mr. Glaser, I believe, was there in the office.

(Testimony of Dwight Holdorf.)

Q. Did you not at that time, Mr. Holdorf, sign a statement in Mr. Wyatt's office substantially to the effect that at the time Mr. Glaser received the Connell note——

Mr. White: No, it's the Skene note.

Mr. Kobin: The Connell note.

Q. (By Mr. Kobin—continuing): ——that he had no knowledge whatsoever of the circumstances under which that note had been obtained?

The Court: Do you remember what the statement said?

The Witness: No, I don't.

The Court: Then you will have to show it to him.

The Witness: I remember definitely signing something down there.

The Clerk: Plaintiffs' Exhibit 13 has been marked for identification. [183]

Mr. White: May I see it? No objection.

Q. (By Mr. Kobin): I am going to hand you what has been marked Plaintiffs' Exhibit No. 13, which is a certified copy of the original of the statement which you executed in Mr. Wyatt's office, and ask you to read it to refresh your memory from it?

Mr. White: Was that all the papers he signed that day, counsel? Mr. Kobin, was that all the papers?

Mr. Kobin: I am not on the witness stand.

Mr. White: Oh.

Q. (By Mr. Kobin): The question I asked, Mr. Holdorf, do you recall signing the statement to that

(Testimony of Dwight Holdorf.)

effect? A. Yes.

Q. Was this statement also signed at Mr. Errion's direction?

A. It was. Mr. Errion told me to sign whatever they had prepared down there.

Q. And this statement is also false?

A. I don't know whether it is false or not. I don't know whether Mr. Errion explained how this mortgage was secured to the Glasers from Mrs. Connell. I do know that Mr. and Mrs. Glaser had a lot of business dealings with Mr. Errion in the McKinney Logging Company, which took quite a period of time, that they [184] had gone to California with him on several occasions, and various times like that. I was strictly taking orders from Mr. Errion. I was breaking away from Mr. Errion. I had my mind made up. He told me to sign whatever they had.

Q. In other words, you didn't know anything about the transaction involving Mr. Errion and Mr. Glaser on the Connell note, then, is that it?

A. I delivered a mortgage to Glasers. The check that came from Glasers, I think it was \$12,500. There was several \$500 checks. It went into my bank account in Vancouver and checked out at Mr. Errion's demands, where he wanted it to go. What Mr. Errion, what he had told him, what deal they had gotten together, I don't think Mr. and Mrs. Glaser would certainly loan any fellow that had nothing \$16,000, and I hardly know them.

* * * * *

(Testimony of Dwight Holdorf.)

Q. (By Mr. Kobin): Mr. Holdorf, you signed the assignment of the mortgage, did you not?

A. Yes, I believe so.

Q. Did you put your name on the back of the note that Mrs. Connell had signed? [185]

A. I endorsed the Connell note, I believe.

Q. And did Mrs. Holdorf endorse the note also?

A. I believe so.

Q. On behalf of whom?

A. I don't recall right now.

Q. Well, on behalf of yourself or the Oyster corporation or Errion?

A. Mr. Errion gave us the orders to endorse that. He held all those notes.

Q. In other words, you didn't have the note at all?

A. No.

Q. You knew that you were signing the assignment of mortgage to Mr. Glaser?

A. I had the assignment of mortgage, yes.

Q. And you, as a matter of fact, recorded it for Mr. Glaser, did you not?

A. Yes, at Mr. Glaser and Mr. Errion's direction, I did. I was going to Seattle, and Mr. Errion sent me up here, and they told me to bring it up and record it and send it back to Mr. Glaser.

Q. You knew at that time that Mr. Glaser had given you \$16,000 by checks?

A. I believe that those cashier's checks were made out—I believe, if I remember correctly, Mr. Glaser endorsed to the Holdorf Oyster Corporation, and they [186] were deposited in the Seattle First

(Testimony of Dwight Holdorf.)

National Bank at Mr. Errion's direction and checked out of there at Mr. Errion's direction.

Q. Did they all go into the Holdorf Oyster account, if you know? A. Pardon?

Q. Did they all go into the Holdorf Oyster Corporation account? A. I believe so.

* * * * *

Q. (By Mr. Kobin): I am going to hand you Plaintiffs' Exhibit 14 for identification and ask you whether or not and in truth and fact this \$12,500 check went into your account, Mr. Holdorf, rather than to the Holdorf Oyster Corporation?

A. Yes, it did. It went into the Seattle First National Bank which is in my name, which was actually Mr. Errion's account and was checked out at his direction. [187]

* * * * *

Q. (By Mr. Kobin): Mr. Holdorf, the compensation that you are seeking that you claim Errion owes you or the National Forest is for the services that you have been relating to this Court here today?

A. I was working for Mr. Errion at his direction. I was entitled to pay, and I never got pay.

Mr. Kobin: Miss Reporter, would you please read the question, and if I may have a direct response plus your explanation, it will be fine.

(Whereupon, the last question was read by the reporter.)

The Witness: That is right.

Mr. Kobin: That's all.

(Testimony of Dwight Holdorf.)

The Court: I believe that's all, Mr. Holdorf. You are excused.

(Witness excused.) [188]

* * * * *

[Endorsed]: Filed February 20, 1958.

[Endorsed]: No. 15920. United States Court of Appeals for the Ninth Circuit. Einar Glaser and Dorothy Glaser, Appellants, vs. Marguerite L. Connell and William F. White and Janet D. White, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: March 1, 1958.

Docketed: March 8, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

APPELLANTS' AMENDED DESIGNATION
OF THE RECORD TO BE PRINTED

Appellants hereby amend their designation of the matters referred to herein as parts of the record necessary for consideration as follows:

1. That portion of the Pre-trial Order as follows:

(a) Admitted Facts as to plaintiffs' claim, ending line 24 page 3;

(b) Contentions of Plaintiffs as to plaintiffs' claim upon complaint, commencing page 5, line 1 to bottom of page 8;

(c) Contentions of defendant to plaintiffs' claim upon complaint commencing top of page 13 and ending at line 1, top of page 17;

(d) Concluding page 21.

2. Findings of Fact and Conclusions of Law and Judgment dated November 15, 1957.

3. Plaintiffs' exhibit No. 1—\$16,000 promissory note.

4. Exhibit No. 2 (Pl.) Mortgage dated July 12, 1950.

5. Exhibit No. 3, Written Assignment of Mortgage.

6. Exhibit 4, but only the following portions:

(No. 3556, Findings of Fact and Conclusions of Law).

* * * * *

7. Exhibit No. 13.

8. Testimony as follows: Commencing on page 5 to 70, inclusive (excluding remarks of Court and counsel); Commencing on page 83 as follows "By Mr. Kobin" and continuing to page 134 concluding with "Q. You and your husband, your partner, etc. * * *";

Commencing on page 168 as follows: Cross Examination, and continuing to and including page 188, ending with words, (Witness Excused).

9. This designation of parts of the record.

/s/ LEO LEVENSON,

Of Attorneys for Appellants.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 18, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION

It is hereby Stipulated and agreed by and between the parties hereto, acting through their respective counsel, that all the exhibits made part of the record on appeal may be considered by the Court in their original form without the necessity of printing. This stipulation refers to Exhibits No. 1, 2, 3 and 4.

Dated this 20th day of March, 1958.

/s/ LEO LEVENSON,
Of Attorneys for Appellants.

/s/ WILLIAM F. WHITE,
Attorney for Appellees.

[Endorsed[: Filed March 22, 1958. Paul P. O'Brien, Clerk.

**United States
Court of Appeals
For the Ninth Circuit**

EINAR GLASER and DOROTHY GLASER,
Appellants,

vs.

MARGUERITE L. CONNELL,
Appellee,
WILLIAM F. WHITE and JANET D. WHITE,
Defendants.

Brief of Appellants

**Appeal from the United States District Court for the
Western District of Washington, Northern Division.**

HON. GEO. H. BOLDT, Judge

LEO LEVENSON,
NORMAN B. KOBIN,
Portland, Oregon,
WAYNE W. WRIGHT,
LAYTON A. POWER,
Seattle, Washington,
Attorneys for Appellants.

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<p>(1) The Findings are contrary to the clear weight of the evidence and were induced by an erroneous view of the law.</p>	
<p>(2) Appellee's contentions in this case were issues tried in <i>Errion et al v. Connell</i>, 236 F. 2d, 447. In that case appellants are acquitted of any conspiracy with Errion. In that case appellee was awarded a judgment against Errion for pecuniary restitution which took into consideration the \$16,000 note and mortgage as being valid in appellants' hands. Therefore, the relief awarded becomes res judicata and merged by judgment.....</p>	
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<p>(3) The doctrine of estoppel applies, that when one of two innocent persons—that is, persons each guiltless of an intentional wrong—must suffer a loss, it must be borne by that one of them whose conduct has rendered the injury possible. Appellee should bear the loss. Her conduct in placing the \$16,000 note and mortgage in Errion's control, made it possible for him to transfer them to appellants who paid \$16,000 which he retained pursuant to his agreement with appellee</p>	
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**United States
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MARGUERITE L. CONNELL,
Appellee,
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Defendants.

Brief of Appellants

**Appeal from the United States District Court for the
Western District of Washington, Northern Division.**

STATEMENT OF JURISDICTION

Jurisdiction of the United States District Court for the Western District of Washington, Northern Division, is based on Title 28, USCA, Sec. 1332 (Diversity of Citizenship). The complaint alleges that appellants are residents and citizens of the State of Oregon; that appellee Marguerite L. Connell is a resident and citizen of the State of Washington; that defendants William F.

White and his wife, Janet D. White, are residents and citizens of the State of Oregon, and that the matter in controversy exceeds exclusive of interest and costs, the sum of \$3,000.00 (Tr. 3-4). These allegations are admitted.

The jurisdiction of this Court is based on Title 28, USCA, Sec. 1291.

STATEMENT OF THE CASE

This appeal involves a suit to foreclose a real property mortgage, dated July 12, 1950, but executed and delivered July or August, 1951.

Appellee, is the owner of the real property. She executed and delivered a promissory note to the order of Holdorf Oyster Corporation for \$16,000.00, due five years thereafter with interest at 6% per annum, and as security she executed and delivered a real estate mortgage which was filed for record on August 14, 1951.

By the pre-trial order, it is admitted (Tr. 4) that the note and mortgage were procured by fraud practiced by Holdorf Oyster Corporation, the original payee and mortgagee, Dwight Holdorf, E. R. Errion, and others, and it is also admitted that Holdorf Oyster Corporation was the alter ego of Errion.

Errion, who has operated in the northwest for the

past 10 years, is reputed to be the cleverest bunco man of his day.

On August 8, 1951, for \$16,000 paid by appellants, Holdorf Oyster Corporation sold, transferred and delivered said promissory note and assigned the mortgage to appellants and ever since said date appellants are the owners and holders thereof. (Tr. 4-5). Appellants acquired the note and mortgage on payment of \$16,000 without knowledge of the acts and conduct practiced by Holdorf Oyster Corporation, Dwight Holdorf, Errion, and others (Tr. 5).

Appellants prayed for a judgment against appellee for the sum of \$16,000 with interest, attorney's fees and costs, and for a decree of foreclosure of said mortgage:

Findings of fact and conclusions of law were entered, inter alia (Tr. 19-20), that appellants exercised complete indifference and neglect and did not act in good faith at the time they purchased said note and mortgage and paid \$16,000 to Holdorf Oyster Corporation; that appellants relied upon other transactions with Errion and not said mortgage to secure the repayment thereof. Further, that appellants knew the note was in default as to the payment of the first year's interest; that appellants made no inquiry or investigation as to title, taxes or ability of appellee to pay said note; that

Errion fraudulently misrepresented said note and mortgage to appellants by representing it was a valid note and mortgage, knowing at the time he had obtained the same by fraud; that appellee at no time conducted herself by any acts or omissions so as to mislead or prejudice appellants as would estop her from asserting as a defense to the said note and mortgage the fraud practiced by Errion, but that she was negligent in executing the note and mortgage and delivering the same to Errion.

A judgment was entered dismissing the complaint and declaring the note and mortgage invalid and void as a lien against the real property.

Errion, a Fabulous Rascal

Prior to 1949 appellee owned various real properties and securities and other personal property, (Tr. 36) and these are the properties plucked from her by Errion. In his long career as a confidence man his victims were mulcted of many thousands of dollars. He is no stranger to appellate courts.

Errion, et al v. Connell, 236 F. 2d, 447,

McKenney, et ux. v. Buffelen Manufacturing Co.,
232 F. 2d, 5,

Glaser et ux v. Connell, 47 Wn. 2d, 622, 289 P. 2d
364,

Duniway v. Barton, 193 Or. 69, 237 P. 2d 930.

Facts Relating to the Execution and Delivery of Note and Mortgage by Appellee

In 1949 Errion was introduced to appellee as being a real estate agent, tax expert, promoter par excellence, and she sought his services. (Tr. 37).

As part of a swindle, she conveyed to Holdorf Oyster Corporation, one of Errion's many corporations, the real property at issue in this case (Tr. 39). Between that period and July, 1951, she was in constant contact with him and his cohorts (Tr. 40), first trying to get some money, then demanding it, in connection with his many unfulfilled and exasperating promises to her.

She told him she badly needed \$20,000 to purchase another home (Tr. 41).

Errion represented he had a potential buyer for the property involved in this case and reached an agreement with appellee whereby he would direct Holdorf Oyster Corporation to convey the property back to her, contingent upon appellee executing a note and mortgage to it for \$16,000 (Tr. 44), it being understood she was to have \$20,000 from the proceeds of the anticipated sale and Errion was to receive \$16,000 for his services. This note and mortgage are the subject matter of this case.

Sometime in July or August, 1951, appellee went to

Portland to complete the transaction. She rebelled in signing the note and mortgage and pointed out she had no money and could not pay the same when it would become due (Tr. 47-50).

Errion assured her the property was practically sold and within two months she would have her money. She noticed the \$16,000 note and mortgage were dated back one year to July, 1950 which aroused her curiosity, but Errion pacified her with an alluring explanation. She realized however, it was improper to sign the note when it was predated, but did so reluctantly (Tr. 47).

Prior to July, 1951 (Tr. 50) many conferences were had with Errion about money matters. She began to have serious doubts and suspicions which arose by reason of previous questionable transactions (Tr. 51).

She was well aware, however, at the time she executed the note and mortgage that if the anticipated sale of the house was not consummated, the mortgage debt would be hers and she could lose the property (Tr. 53-54).

(Tr. 47)

"There were four, five people around, a secretary, and old Mr. Davenport who was ready to put a stamp on something, and anyhow they had a lot of papers around, and I suppose I did—anyway, he volunteered to take care of this property, and I was to get it back in my name, and so he put this

paper in front of me, and I said, "What does it mean?" I said, "You know I have no money. I can't pay for this \$16,000." He was asking me to sign a note. I have always been afraid of notes that borrow on interest, six per cent, five or six percent. I said, "You know I can't pay for this. Suppose something happens? This man doesn't buy this property." He said, "Oh, you have five years, but that shouldn't happen. It will be taken care of. Within two months, at least, you will have your money. Then you go on and buy this house." I said, "Why don't you sell it?" I think you have repeated that. I don't need to tell that over and over again—he said, "Because it would be better if it came from you as an individual," and I said, "Is there anything wrong about this thing?" He said, No. This sort of thing is done every day by businessmen," and after I signed it, and they endorsed, or whatever it is, they stamped it. **I had read it through**, but I happened to glance at the date above which I hadn't paid any attention to, and it was dated one year before, and I made quite a fuss about that . . .

(Tr. 48)

A. Well, I didn't think it was right in the first place. I would be paying interest. If anything happened to that—I had a little sense. I didn't have much. I had enough to know I might have to pay this interest. I didn't see why I should pay a whole year's interest when I hadn't the thing in my hand until this moment which was in '51, I think. He had dated it back to '50, and I made a howl about it.

She testified that by **January, 1951**, at least, she had

absolutely no reason to doubt that Errion, Holdorf, and their whole crowd were confidence men. (Tr. 66).

The Purchase of the Note and Mortgage by Appellants

Operating in the timber of Tillamook County, Oregon during the years 1948 to 1951 and prior thereto, was a logging partnership known as McKenney Logging Company which consisted of Bart McKenney and his wife, Marie McKenney and the appellants Glasers. They were desirous of dissolving their partnership and selling the assets and had set a price around a million three or four hundred thousand dollars (Tr. 77).

They fell into the hands of the Master of Chicanery, Errion, and he, as stated by Judge Chambers, . . . "seems to have led them to the point of no return and into a world of woe," . . . 232 **Fed. (2) 5. McKenney v. Buffelin Mfg. Co.**

In the course of Errion's machinations as a broker for McKenney Logging Company, and at the same time representing appellee, he advised appellants he was temporarily short of funds and wanted a loan and would give some security.

In August, 1951, Errion represented he had some obligations to meet and would like to pledge a note and mortgage he owned for the face amount of \$16,000 (Tr. 81-88). He importuned appellants to give him

\$16,000 through the Holdorf Oyster Corporation and as security to receive an assignment of the note and mortgage theretofore executed by appellee.

Appellants made no inquiry as to how he happened to have possession of appellee's \$16,000 note and mortgage but like many of his victims, were impressed with his integrity and were mesmerized into a sense of security. They gave him \$16,000.

In entering judgment in the lower court, **Errion et al v. Connell**, 236 Fed (2) 447, Judge Lindberg described Errion as a "fantastic person endowed with great facilities of persuasion, a magnetic personality and an irresistible charm."

Note and Mortgage Subject of Prior Litigation

Appellée in 1953, brought an action in the United State District Court for the Western Division of Washington, Northern Division, Case No. 3556, against Errion and others, including appellants, charging all with fraud and seeking damages together with a prayer for the cancellation of certain instruments, including the within note and mortgage. **Errion et al v. Connell**, 236 F. 2d 447. (Exhibit 4, Tr. 8).

Appellee obtained a judgment against Errion and others for a total amount of \$83,077.49.

After trial the said action was dismissed as to these appellants.

In determining the amount of the aforesaid judgment, the court considered the note and mortgage at issue in this case as a valid and existing obligation owing and outstanding by appellee in so far as appellants herein were concerned and allowed appellee in the judgment full credit for the amount thereof, to-wit: \$16,000.00 plus interest of \$4,314.68 (Pl. Exh. 4, Tr. 8-21).

Appellants had filed an action in the Superior Court, State of Washington, against appellee to foreclose the mortgage. The trial court held that appellants were not holders in due course because there had been no valid endorsement of the note. The action was dismissed without prejudice. The case was affirmed on appeal. **Glaser et ux v. Connell**, 47 Wn. (2) 622, 289 P. (2) 364.

Specification of Errors

1. The findings of fact and conclusions of law are against the clear weight of the evidence and were induced by an erroneous view of the law.
2. The court erred in not finding that the judgment in Case No. 3556, which was thereafter appealed to the Court of Appeal, No. 14797, Exhibit 4, is res judicata and estops appellee from relitigating similar issues in this case.
3. The court erred in not finding that appellee is

estopped from claiming the note and mortgage are not valid obligations, for the reason, in Case No. 3556, the court considered the note and mortgage as a valid and existing obligation owing by appellee in so far as appellants were concerned, and in said Case No. 3556, rendered a judgment by way of pecuniary restitution, allowing appellee full credit for the amount of the note and mortgage.

4. Having found that appellee was negligent in executing and delivering the note and mortgage to Errion, the court erred in not thereby concluding that she should suffer the loss, for when one of two innocent persons must suffer a loss, it must be borne by the one whose conduct rendered the injury possible.

5. The court erred in finding of fact No. 5, Tr. 19, that appellee did not realize she had executed the note and mortgage. This finding is contrary to all the evidence.

6. The court erred in finding of fact No. 7, Tr. 20, that appellants have no legal title to the note and mortgage. This finding is contrary to the judgment in Case No. 3556.

7. The court erred in finding of fact No. 8, Tr. 21, that appellee was not guilty of estoppel in pais.

Questions Involved

1. Whether appellee's judgment for \$83,077.49 in Case No. 3556, and which considered the \$16,000 note and mortgage as a valid and outstanding lien, is res judicata and a bar to the right of appellee litigating the same issue in this case? Appellants contend that the judgment is res judicata of all defenses.

2. Whether appellants or appellee should bear the loss caused by the wrongful acts of Errion?

Appellants contend that appellee should bear the loss because by her acts and conduct, she made it possible for Errion to defraud appellants.

Summary of Argument

1. Appellee previously filed an action for damages (Case No. 3556) and to cancel certain instruments, including the note and mortgage involved in this appeal. In that case she recovered judgment for the full amount of her loss and included in the judgment was an allowance by way of pecuniary restitution of the value of the note and mortgage of \$16,000.

The court cancelled the note insofar as Holdorf Oyster Corporation was concerned, and it did not void it insofar as appellants were concerned. Thus, a merger of appellee's cause of action was effected by her acceptance of the judgment for pecuniary restitution.

This merger by judgment is *res judicata* as to her claim for cancellation, and she is estopped in this case from obtaining such relief. She did not appeal the judgment in Case No. 3556 and is bound by its terms.

2. Appellee, **prior** to the execution and delivery of the \$16,000 note and mortgage, was fully aware that Errion was a scoundrel and swindler. Nonetheless, she hoped to recover from him as much of her property he swindled her out of that she could, even though it necessitated some activity on her part. He represented he had a sale of the property involved in this case whereby she would receive \$20,000 cash but he wanted \$16,000 for himself. To accomplish this, he agreed with her that Holdorf Oyster Corporation would re-convey the property in consideration of her executing a note and mortgage to it for \$16,000, she well knowing that Errion intended to dispose of the note and mortgage. She held out Errion as her agent to sell the property and placed the note and mortgage into his control, knowing it would be transferred to a third person.

Appellee was guilty of negligence or misplaced confidence and under the doctrine of estoppel, where one of two persons must suffer a loss, it must be borne by that one of them who, by his conduct, has rendered the injury possible.

3. In weighing the equities the evidence, without

contradiction, shows that appellee benefitted from the transaction in which the \$16,000 note and mortgage was executed.

In 1949 she had already been defrauded by Errion of much property, including the property involved in this case and upon which the court in Case No. 3556 placed a value of \$45,000. After repeated demands on Errion she secured a re-conveyance of this property, but only on conditions imposed by him, i.e., that she execute the note and mortgage so that he could realize for himself the sum of \$16,000. Thus, she obtained the return of some property having a net value to her of \$29,000.

ARGUMENT

I.

The findings of fact and conclusions of law are against the clear weight of the evidence and were induced by an erroneous view of the law.

It is a rule on appeal, that findings of the lower court are clearly erroneous when, although there is evidence to support them, they were induced by an erroneous view of the law. **Stevenot v. Norberg**, 210 F. 2d 615, **Smyth v. Erickson**, (9th), 221 F. 2d 1; **Barry v. Lawrence Warehouse Co.**, (9th), 190 F. 2d 433; **Kaufman-Brown**

Potato Co., v. Long, (9th), 182 F. 2d 594; **West v. Conrad**, C. A. 9th, 182 F. 2d 255.

And, too, a finding is "clearly erroneous" when, although there is evidence to support it, a reviewing court on the entire record is left with a definite and firm conviction a mistake has been committed. **U. S. v. Oregon Medical Soc.**, 72 S. Ct. 690, 343 U. S. 326, 96 L. Ed. 978.

A review of this case supports only one conclusion—appellants and appellee each were victims of the machinations of Errion—thus leaving as the principle issue: Who should bear the loss by reason of his acts?

There are several cogent reasons to find that the judgment of the lower court is clearly against the weight of the evidence and that a mistake has been committed in not holding that appellee should bear the loss.

II.

Res Judicata

The first error is the failure of the court to apply the doctrine of res judicata and merger by judgment.

Incorporated by reference in the Findings of Fact (Tr. 21) in this case, Nos. 9-10, are the complaint, answers of appellants, findings of fact and conclusions

of law, judgment and order of dismissal in Case No. 3556, **Errion et al v. Connell**, 236 F. 2d 447.

Case No. 3556, involved an action by appellee against Errion, et al, including these appellants, for damages together with a prayer for the cancellation of certain instruments, including the \$16,000 promissory note and mortgage involved on this appeal. The complaint prayed that the mortgage lien be removed and nullified. Appellee charged Errion, his henchmen, and these appellants, with a conspiracy to defraud her out of many properties.

These appellants were exonerated after the court considered all the evidence and a judgment of dismissal was entered as to them. The court did declare void and cancelled certain instruments, as appears in the judgment, to which this Court is respectfully referred. The judgment cancels the title to the \$16,000 promissory note "so far only as the title or interest of Holdorf Oyster Corporation is concerned," thereby recognizing appellants' title thereto.

In Findings of Fact No. 7, (Tr. 20) in this case at bar, however, the court finds that appellants have no legal title to the note and mortgage as they were induced and procured from appellee by the fraud of Errion and Holdorf Oyster Corporation. This finding is incompatible with the findings and conclusions in Case No. 3556,

and results in one court deciding an issue of fact contrary to the decision of another court involving the same parties, the same subject matter and issues.

In the case at bar, as a defense, appellee raised identical issues as were raised and tried in Case No. 3556.

In this case she demands the same relief as was demanded in Case No. 3556. The law is clear, that material facts or questions which were in issue in a former action or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action between the same parties, regardless of the form the issue may take in the subsequent action, whether the subsequent action involves the same or a different form of proceeding, or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action. 30 A. **Am. Jur.** Sec. 371, p. 411. **Stokke et ux v. Southern Pac. Co.**, 169 F. 2d 42 (9th).

We have pointed out appellants were exonerated by the court and findings and a judgment of dismissal as to these appellants were entered. Exhibit 4.

This dismissal, under Rule 41 (b) **Rules of Civil Procedure**, operates as an adjudication upon the merits.

In **Stokke et ux v. Southern Pac. Co.**, *supra*, defend-

ant's answer in prior action raised defenses based on statute of limitations, contributory negligence, as well as a general demurrer, and defendant was subsequently granted its motion for summary judgment, such summary judgment was res judicata in subsequent suit by same plaintiff against same defendant. The Court said:

"But here the judgment entered in the earlier case did not merely dismiss the action, on the ground of limitations or otherwise. It was not merely a judgment of non-suit. It was a general judgment in favor of defendant and against the plaintiff, without specifying or even suggesting any particular ground upon which it was predicated. That was the sweep of the judgment and it must be so taken here. It cannot be modified or narrowed in this suit. It may have been correct insofar as the defense of limitations was concerned and erroneous in all other respects. But an erroneous judgment fairly and regularly entered by a court of competent jurisdiction is nevertheless an effective bar under the doctrine of res judicata to a subsequent action between the same parties on the same cause of action."

It is fundamental that an agreement induced by fraud is voidable and not void. 23 **Am. Jur.**, Sec. 19, p. 770; **Baker v. Casey**, 166 Or. 433, 112 P. 2d 1031.

Also, one injured by fraud may elect to accept the situation and recover his damages or he may repudiate the transaction and seek to be placed in statu quo, but

he cannot do both. **Keylon v. Inch**, 35 P. 2d 73, 178 Wash. 522; **Voellmeck v. Harding**, 6 P. 2d 373, 166 Wash. 93, 84 ALR 608; 37 **C.J.S.** Sec. 65, p. 354.

In Case No. 3556, the Court awarded appellee relief by way of pecuniary restitution, because the rights of appellants had intervened, and this award was in lieu of the cancellation of the note and mortgage. Appellee did not appeal from this judgment by way of pecuniary restitution and thereby elected to accept it in lieu of rescission.

In Findings of Fact No. 10, in this case at bar, it is admitted that included in the \$83,077.49 judgment rendered in Case No. 3556, consideration had been given to the note and mortgage held by appellants in the sum of \$16,000, and the further sum of \$4,314.68 interest thereon, and this sum was included in the money judgment against Errion, et al.

In computing the amount of the above judgment, it was found that Errion et al, had fraudulently obtained properties of appellee in the total amount of \$124,-180.09. From this total amount the court allowed as credit the value of properties restored by him to appellee.

Included in the properties restored was the real property subject to the mortgage involved in this case at

bar and upon which the court placed a valuation thereon at \$45,000.00.

In arriving at the amount of the deduction the court took into consideration that the property was subject to the \$16,000 mortgage and subtracted this indebtedness together with interest from its valuation of \$45,000, Exhibit 4, page 22, paragraph 32.

By virtue of the above judgment the cause of action for fraud committed by Errion, et al, became merged in the judgment.

One of the issues litigated in Case No. 3556 was a claim for cancellation of this note and mortgage owned by appellants. Appellants were exonerated of any charges of fraud and by way of pecuniary restitution to appellee against Errion, the court rendered a judgment against him which included the value of the outstanding promissory note, plus interest. **This has the effect of merging any cause of action relating to the execution and delivery by her of the promissory note and mortgage** into the aforesaid judgment of \$83,-077.49, and under the doctrine of res judicata appellee is estopped from relitigating the same issues.

The judgment for pecuniary restitution crystallized the rights of the parties through judicial proceedings and the judgment rendered therein merged the cause

of action into a fixed and final form. In 50 **CJS**, Sec. 599, p. 20, it is stated:

"A claim or demand which is put in suit and passes to final judgment is merged or swallowed up in the judgment; and this rule applies to a final decree in a court of equity. The judgment extinguishes the original cause of action, which loses its vitality and cannot thereafter be litigated, either as a cause of action or as a set-off or counter-claim, unless a statute otherwise provides; and the rights of the parties are governed by the judgment. Moreover, as a general rule all the peculiar qualities of the claim are merged in the judgment which then stands on the same footing as all other judgments."

Review, also, 30 A. **Am. Jur.** Sec. 313, p. 365.

The doctrine of merger by judgment is particularly applicable to this case. To permit appellee to obtain different relief in this case than she accepted in Case No. 3556, is a superfluous and vexatious encouragement to litigation, injurious to the appellants, and gives appellee double relief. By way of analogy is **Hein v. Chrysler Corporation**, 45 Wash. (2) 586, 277 P. (2) 708, where the court said:

"... By his judicial admission that he will apply any amounts received in payment of the Federal court judgment against Chrysler pro tanto in satisfaction of any judgment rendered in this case, appellant concedes that he is suing Chrysler twice for the same wrongful act. He asks, in effect, to

be allowed to submit his claim for the identical items of damage to two juries on two different legal theories and to retain the benefit of the larger of the two judgments recovered in the two actions. Appellant cites no precedent (and we know of none) which would allow such a procedure."

III.

The Findings are Contrary to the Evidence

A further reason to find the lower court erred and a mistake has resulted therefrom is that the findings of fact are clearly erroneous. In Finding of Fact No. 5, Tr. 19, it is stated:

"... Defendant, Marguerite L. Connell, did not realize she had executed a mortgage on said real property . . ."

The uncontradicted evidence is that prior to the execution and delivery of the note and mortgage she had been swindled out of the property by Errion and it was in the name of Holdorf Oyster Corporation. She needed \$20,000 and after making repeated and exasperating demands upon Errion for money it was agreed between them he would have Holdorf Oyster Corporation reconvey the property back to her upon her executing and delivering to it her note and mortgage secured by said property. Thus, there is no evidence to support the finding that she was unaware of the fact she had executed and delivered this mortgage.

In Finding of Fact No. 7, Tr. 20, it is stated:

"... That plaintiffs have no legal title to said note and mortgage as such instruments in the first instance were induced and procured from defendant ... by fraud practiced upon her by E. R. Errion. . ."

This finding is contrary to the evidence. In Case No. 3556 the court voided the note only in so far as Holdorf Oyster Corporation was concerned. It, therefore, must have concluded that appellants are in fact the owners of the note and mortgage.

In Finding of Fact No. 8, it is stated:

"That defendant at no time conducted herself by any acts or omissions so as to mislead or prejudice plaintiffs as would estop her from asserting as a defense to said note and mortgage. . ."

This finding is contrary to the clear weight of the evidence and in support of this viewpoint, the Court is respectfully referred to the following disquisition.

IV.

Estoppel in Pais

Another cogent reason for finding that the lower court made a clear mistake and erred, was by not properly applying the doctrine of equitable estoppel or estoppel in pais.

Appellee voluntarily clothed Holdorf Oyster Corpora-

tion and Errion with title and authority over the \$16,000 note and mortgage and is estopped to deny such title or authority as against appellants who in ignorance of the true situation relied on such appearance to their prejudice.

Appellee wilfully and intentionally gave control of the note and mortgage to Holdorf Oyster Corporation or Errion pursuant to their agreement, and placed them in a position to defraud appellants in relation thereto, and because her voluntary act facilitated the fraud she should bear the loss. Errion was the agent of appellee.

In **Kiley v. Bugge, et ux**, 165 Wash. 677, 5 P. 2d 1038, defendants, executed, and delivered their note and mortgage to Osner & Mehlhorn, Inc., for the purpose of having that corporation pay and cause to be discharged a note and mortgage held by the Metropolitan Life Insurance Company on the property described in the mortgage.

Their negotiations were conducted with Augus Mehlhorn, Jr., secretary of the corporation, to whom they delivered the note and mortgage. The note was payable to the order of Osner & Mehlhorn, Inc.

The original payee, on the 4th day of May, 1929, by a separate instrument assigned the note and mortgage to plaintiff. **The note in question bears no indorsement.**

Plaintiff paid \$2,500 for the note and mortgage, and received interest quarterly for one year after the purchase.

Defendants did nothing in connection with the transfer of the note and mortgage by the payee to plaintiff; they knew nothing about the transfer until Osner & Mehlhorn, Inc., went into the hands of a receiver.

The mortgage held by the Metropolitan Life Insurance Company has not been discharged. There was due thereon principal, interest, and penalty in the sum of approximately \$2,400.

Plaintiff contends that his mortgage constitutes a lien upon the real estate junior to the mortgage held by the Metropolitan Life Insurance Company.

Defendants insist that there was no consideration for their note and mortgage which they gave to Osner & Mehlhorn, Inc.; that it was given because of the agreement of the original payee to pay and cause to be discharged the note and mortgage held by the Metropolitan Life Insurance Company; and that such agreement was not carried out by the original payee.

It is apparent from the facts that Osner & Mehlhorn, Inc., was the agent of defendants for the purpose of discharging the note and mortgage held by the Metropolitan Life Insurance Company.

Defendants, as was appellee in this case at bar, were guilty of negligence in executing and delivering to Osner & Mehlhorn, Inc., the note and mortgage which were to be used for the purpose of raising money to liquidate the first mortgage because in doing so, they gave Osner & Mehlhorn, Inc., such indicia of ownership that a reasonable man dealing with such agent is reasonably led to believe the agent is the owner of such note and mortgage and where a reasonable man parts with value in reliance thereon, he will be protected even though the true owner is guilty of no more than misplaced confidence.

In reaching the conclusion that even though a holder of a note is not a holder in due course under the negotiable instrument law and takes it subject to defenses, nonetheless, the Court concluded that the rule of **estoppel in pais** was applicable.

"Where a loss that is occasioned by a wrongful act of a third party must fall upon one of two innocent parties, the one whose conduct made the loss possible must bear it, is a principle long recognized and followed. In the case at bar, the loss occurred because respondents placed in the possession of Osner & Mehlhorn, Inc., a note and mortgage, regular upon the face of the instruments, and duly made, executed, and delivered by respondents. We cannot agree with their position, which is in effect that they may escape liability because these instru-

ments were not used by Osner & Mehlhorn, Inc., as respondents intended they should be . . .

In the case at bar, respondents made, executed, and delivered their note and mortgage to Osner & Mehlhorn, Inc., expecting that the original payee would cause the discharge of the mortgage held by the Metropolitan Life Insurance Company. They did not require from the original payee evidence of the discharge of the prior mortgage. Had this been done by them at any time prior to the time appellant became the assignee of the note and mortgage, neither respondents nor appellant would have suffered any loss. An application of the principle that, where one of two innocent parties must suffer loss from the act of a third, the one whose conduct made the loss possible must sustain it, require that appellant should be permitted to foreclose his mortgage."

In **Clemmons v. McGeer**, 63 Wash. 446, 115 Pac. 1081, plaintiffs were the owners of certain lands in Tacoma, upon which one Bell contracted to erect a house, and was to be paid therefor in part by a conveyance of the lands in controversy. When the building was partly constructed Bell requested a conveyance, representing that the material furnished and work done upon the building amounted to \$725, the agreed value of the land involved.

Plaintiff then executed a deed to the land, leaving the name of the grantee blank. Bell was unable to procure receipts for more than \$265, showing payment

for the material furnished and work done on the house, and requested plaintiff to leave the deed with him until next morning when he would produce receipts, aggregating \$725.

Relying upon this representation plaintiffs left the deed with Bell, who took the deed to McGeer, and negotiated a loan for \$650 upon the premises, and inserted in the deed the name of G. M. McGeer as grantee, and delivered it to him as security for the loan.

It was held that the possession of the deed by Bell constituted sufficient implied authority in him to fill in the blank with the name of the grantee, and that the conveyance must be upheld to the extent of McGeer's interest in the land. The Court saying:

"Now had Bell's name been inserted in the deed at the time it was executed by appellants, and had Bell then conveyed by deed of his own to respondent, clearly respondent would have acquired an interest in the land as an innocent purchaser or mortgagee."

Also, **Nicklesch v. Flynn**, 168 Wn. 310; **Ross v. Johnson**, 171 Wn. 658; **Diimmel v. Morse**, 36 Wn. 2d 344, 218 P. 2d, 344; **Beckmann v. Ward**, 174 Wn. 326; **Tobey v. Kilbourne**, 222 Fed. 760.

In this case at bar, by Finding of Fact No. 8, appellee "was negligent in executing the note and mortgage and delivering such to E. R. Errion."

"Not clearly distinguishable in all situations from estoppel based on negligence is the legal maxim that when one of two innocent persons must suffer from the acts of a third, he who has enabled such third person to occasion the loss must sustain it, a principle upon which many of the cases governing the protection of holders of negotiable or non-negotiable instruments are governed. This is a principle of manifest justice, when confined within its proper limits. It finds difficulty in application with respect to what statements, acts, or conduct of a party sought to be charged can properly be said to have enabled a third person to have occasioned the loss, within its meaning. It applies with most rigor, perhaps, where the carelessness or negligence of the one party has permitted the third party to occasion the loss. It finds most frequent application with respect to the rights of innocent purchasers of lost, stolen, misappropriated, etc., instruments."

8 **Am. Jur.**, Sec. 345, p. 82.

In this case at bar, the evidence shows appellee authorized Errion, as her agent, and as part of a mutual transaction, to sell the real property involved in this suit and it was agreed between them she was to receive \$20,000 from the proceeds of the anticipated sale and he was to receive \$16,000. (Tr. 47-54).

In pursuance of **this agreement** she freely, knowingly and purposely executed the note and mortgage and delivered it to Errion. Even if it could be assumed

Errion violated his agreement with appellee, or that she had misplaced her confidence in him, nonetheless, under the doctrine of estoppel, a bona fide purchaser of a non-negotiable chose in action from one to whom the owner gave absolute ownership obtains a valid title as against such owner.

It is stated in 19 **Am. Jur.**, Sec. 69, page 699:

"It may be said, generally, that where the owner of things in action, though not technically negotiable, has clothed another to whom they are delivered in the method common to all merchantile communities, or according to the custom in the locality in which the transfer took place, with the apparent indicia of title, there will be an estoppel against the former in favor of an assignment of the latter for value and without notice. This principle operates generally to protect one who has in good faith purchased or accepted as security for a loan a certificate of corporate stock from one upon whom the real owner had conferred apparent title. Ordinarily, in the absence of statute, estoppel does not arise where the apparent owner obtains possession of the instrument or security by stealing it or where the transfer involves forgery or other criminal acts which the owner was not bound to anticipate, although the rule is otherwise where nothing more than fraud or breach of trust is involved."

Kucher v. Scott, 96 Wash. 317, 165 P. 82, is apposite to the case at bar.

The plaintiffs, being the owners of certain real prop-

erty which was covered by two mortgages, claiming that one of the mortgages was invalid but not knowing which one, brought suit for the purpose of securing the cancellation of the void mortgage, whichever one it might be.

For many years A. Robinson & Co. had been engaged in the real estate, loan and insurance business. All the transactions herein involved were handled by this company through its secretary, Lewis.

Plaintiff purchased from Riley and wife a dwelling house which property was subject to a mortgage held by one Benson. This mortgage and the note which it was given to secure, were made payable to A. Robinson & Co., and by it were transferred to Benson.

It was the custom of that company when making loans, to have the note and mortgage made payable to it and then endorse the note and assign the mortgage to the person advancing the money.

The Benson mortgage was due three years after date or on October 13, 1914. On September 9, 1912, this mortgage was purchased by Scott, the note was endorsed to him and the proper assignment of mortgage placed on record.

Some months prior to October 13, 1914, plaintiff was approached by Lewis with reference to a renewal and after some negotiation on September 1, 1914,

plaintiff and wife executed a note and mortgage payable to A. Robinson & Co., and delivered the same to Lewis.

At this time Lewis had informed plaintiff that he was getting the money from a man who resided in Portland, Oregon, but the name was not disclosed. After the note and mortgage were received by Lewis, the note was endorsed and forwarded to Portland to one of the defendants, Campbell.

Thereafter Campbell drew a check payable to the order of A. Robinson & Co. and forwarded the same to it. Lewis appropriated the money which had been received from Campbell and subsequently committed suicide.

The principle, where one of two or more innocent persons must suffer by the acts of another, he who has placed it in the power of that person to occasion the loss must sustain it, was presented.

In considering this principle of law as applied to the case, the Court said:

"With this principle of law in mind, the case, so far as it involves the appellant and Campbell, will be first considered. The appellant executed the note and mortgage made payable to A. Robinson & Co., and delivered the same into the possession of Lewis, as secretary of that company. Campbell was requested by Lewis to forward his check

before he received the note of the appellant, but this was not done. The check was not forwarded until the note, properly endorsed, had been received. Campbell had done no act by which he placed it within the power of Lewis to occasion the loss. On the other hand, **the appellant had delivered to him the note and mortgage drawn in such form he could use them in any manner he saw fit. The appellant having placed it in the power of Lewis to commit the wrong is the one that should bear the loss, rather than Campbell.**" (Emphasis added)

Appellee cannot be deemed an innocent person for **when she executed and delivered the note and mortgage she was fully aware of Errion's proclivities; she well knew he was a fraud and cheat** and despite this knowledge, she freely, although reluctantly, placed in his hands the \$16,000 note and mortgage drawn in such form he could use it in any manner he saw fit.

In this connection, **he did precisely what she and he agreed would be done**—he was to receive \$16,000 and she was to have \$20,000 when the house was sold. The house was not sold as anticipated but unquestionably her acts and conduct made it possible for him to obtain \$16,000 from appellants.

Prior to her association with Errion, appellee had made inquiry of Dr. Kincaid who is connected with the University of Washington as to whether she should transact business with him (Tr. 55-56) and was in-

formed that he was not an honest man and that she should not do business with him.

Appellee had introduced a Mrs. Skene to Errion (Tr. 56-57) and was in constant contact with her between 1949 and 1951 (Tr. 57-58). She regretted having introduced Mrs. Skene to Errion. Appellee was having qualms of conscience **and knew in the early part of 1951** (Tr. 64-65) that Errion and his associates were practicing some type of scheme or fraud upon her and she came to the definite conclusion in 1952 that they were scamps and scoundrels and that she had been taken (Tr. 65).

Appellee's Acts and Conduct

Tr. 42-43

Q. I will ask you, Mrs. Connell, whether or not you recall the following questions being put to you and the following responses made:

"Question: And did either Mr. or Mrs. Holdorf or Mr. or Mrs. Errion ever make any representations at all with respect to Dorothy Glaser and Einar Glaser, Mrs. Connell?

Answer: No, except this. I heard Bob Errion say that he was handling a big logging business, that there were 55 heirs, and among them was a man by the name of Einar. I can't remember, but it must have been a man

by the name of McKinney, and he mentioned some others.

Question: When was that?

Answer: Oh, in 1950 or in early 1951."

Tr. 55

"Question: What did Mr. Errion say to induce you to sign the note down there in Portland? What did he tell you?

Answer: He told me he would put it back in my name and sell it.

Question: Put what back in your name?

Answer: The house I live in. I said, "Why don't you sell it and give me the 20 thousand I want," and he said, "No, it would look better if they get it from an individual person," and he said, "You will pay me 16 thousand, and I will get you 20."

Question: Did he say anything as to whether or not he had a buyer?

Answer: Yes, certainly.

Tr. 45

A. I don't recall that testimony, but that is true.

Tr. 46

Q. Getting back to this \$20,000, did Mr. Errion present you with any papers to sign, Mrs. Connell, when he was starting this transaction to sell this house for you and get the \$20,000 for you?

Q. A. I am supposed to say yes or no, aren't I?

Q. You can, Mrs. Connell. Go ahead and respond the way it would be most comfortable for you.

Tr. 46

A. For Mr. Errion I suppose I have signed, I don't know—I think maybe it's exaggeration—a thousand papers, but certainly hundreds. He did everything in triplicate, sometimes in quadruplet and sometimes in quintuplets.

Q. And did you have a discussion with him immediately **prior to this transaction being closed whereby you were going to get your property back**, and then he was going to sell it, and you were going to get \$20,000?

A. Yes.

Tr. 49

Q. Well, so that we have no misunderstanding, **you did realize, Mrs. Connell, that it was perhaps improper to sign this note when it was predated** when you knew that he was going to sell your house to some party, and you were going to get \$20,000? A. Yes.

Q. And he was going to get 16 out of the deal which was this note? A. Yes.

Q. But you went ahead, the transaction was consummated anyway? A. I was what?

Q. The transaction was consummated anyway?

A. Yes. **I was concerned about the date**, a year behind.

Q. It was right there at the office that day?

A. Yes, but I didn't see it until it was all done.

Q. Until, you mean, you signed it?

A. I had signed it, and it was all stamped and finished.

Q. The note was still there in the office, was it not?

A. Yes. They were hurrying me to catch a plane. They were going to take me to catch my plane.

Q. **Mr. Errion did explain to you, did he not, this was the method of getting you \$20,000 for your house?**

A. Yes.

Th. 65

Question: So that you then knew that Mr. Errion, Mr. Holdorf and Mr. Williamson was practicing some type of scheme or fraud upon you, did you not?

Answer: **I did after possibly 1950.** Well, I came to that definite conclusion in 1952.

Question: So, at least by 1952, you knew pretty well the type of individual Mr. Errion was and the type that Mr. Holdorf was and the type that Mr. Williams was?

Answer: Well, a woman with no more experience than I should never have had anything to do with that kind of people, but it gradually came to me they were scamps and scoundrels.

Question: And that you were being taken?

Answer: That is right."

Tr. 66

Question: **So that by January of 1951**, at least, you had absolutely no reason to doubt but that Mr. Holdorf was also a cheat and a fraud?

Answer: Yes. Yes, the whole crowd together. I rarely saw Bob Errion unless I saw Holdorf because he drove him everywhere."

Q. Is that a true statement of the facts?

A. To the best of my knowledge, yes.

The burden of proof that note and mortgage were invalid is upon appellee. **Morisse v. Salvesen**, 165 Wn 157.

Appellee made it possible for Errion to victimize appellants. Errion, through Holdorf Oyster Corporation, held title to her property and would not reconvey it to her unless she participated in his scheme to sell it subject to a mortgage. She was fully aware of the consequences of executing the note and mortgage but was impelled to go along with his program so she could obtain title, and this conduct on her part was found to be negligent. (Tr. 21). The note and mortgage, good on its face, was voluntarily placed in the control and power of Errion for the purpose of doing what he and appellee agreed should be done. Her acts made it

possible for him to use his "great facilities of persuasion, personal magnetism and irresistible charm," to obtain \$16,000.00 from appellants in exchange for her note and mortgage.

CONCLUSION

Taking this case by its four corners a mistake was made by the lower court in evaluating the entire evidence upon an erroneous view of the law. The doctrine of estoppel, that when one of two innocent persons must suffer a loss, it must be borne by that one whose conduct made the injury possible, should be applied against appellee.

The judgment should be reversed and a decree of foreclosure rendered.

Respectfully submitted,

LEO LEVENSON,

NORMAN B. KOBIN,

Portland, Oregon,

WAYNE W. WRIGHT,

LAYTON A. POWER,

Seattle, Washington,

Attorneys for Appellant.



United States
COURT OF APPEALS
for the Ninth Circuit

EINAR GLASER and DOROTHY GLASER,
Appellants,

-VS-

MARGUERITE L. CONNELL,
Appellee.

BRIEF OF APPELLEE

*Appeal from the United States District Court for the
Western District of Washington, Northern Division.*

HON. GEO. H. BOLDT, Judge.

WILLIAM F. WHITE,
WHITE, SUTHERLAND & WHITE,
1100 Jackson Tower,
Portland, Oregon,

MALCOLM S. MCLEOD,
Dexter Horton Building,
Seattle, Washington,

Attorneys for Appellee.

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United States
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BRIEF OF APPELLEE

*Appeal from the United States District Court for the
Western District of Washington, Northern Division.*

HON. GEO. H. BOLDT, Judge.

For the second time now Marguerite L. Connell, an 83 year old widow is before an appellate court defending her home from foreclosure on this same note and mortgage. Appellants first sought foreclosure in the Washington courts as holders in due course; only to lose their preferred status which would have "insulted" them from the fraud of Errion. *Glaser v. Connell* (1955), 47 Wn. 2d 622, 289 P.2d 364. This time they have at-

tacked with a foreclosure suit commenced in the United States District Court for the Western District of Washington. This time they come, not as holders in due course, but as mere assignees of the note and mortgage which they blandly stipulated in writing were obtained in the first instance from Appellee by fraud of their assignor. From the judgment dismissing their suit Appellants have appealed.

Appellants have raised only two basic questions on this appeal:

First, whether Case 3556—*Errion v. Connell* (9 Cir., 1956), 236 F.2d 447, is res judicata and a bar to Appellee asserting her defense of fraud in the case at bar; and

Second, whether the district court erred in refusing to apply in Appellants' favor the equitable doctrine of comparative innocence so that they might have prevailed in spite of the fact they were naked assignees of fraudulent paper.

RES JUDICATA NOT INVOLVED

Because Appellants in their brief have dwelt more upon the activities of the "fabulous rascal" than upon the precise nature of Case 3556 it is incumbent upon Appellee to present an analysis of that former case and show how it cannot possibly constitute a bar to Appellee here under any theory of res judicata, collateral estoppel, merger or election of remedies; all being contentions which Appellants have asserted in a conglomerate fashion.

Since Appellants were dismissed from Case 3556 prior to entry of judgment in favor of Appellee and against others the Appellants are "strangers" to that judgment.

An inspection of Exhibit 4 and a review of this Court's recent opinion in *Errion v. Connell* (9 Cir., 1956), 236 F.2d 447, will show that Case 3556 was an action brought by Appellee as plaintiff against Appellants and others as defendants charging that they conspired in a scheme to defraud Appellee of her securities and other property in violation of Section 10(b) of the Securities Exchange Act of 1934, as amended (15 USCA § 78a) and Rule X-10B-5 as promulgated by the Securities and Exchange Commission (17 C.F.R. § 240, 10B-5). This note and mortgage were a subject of that action and the note (but not mortgage) was cancelled by the Court "so far only as the title or interest of Holdorf Oyster Corporation is concerned" pursuant to authority to do so under Section 29(b) of the Securities Exchange Act of 1934 (15 USCA § 78cc).

However, the fact which is so essential in considering the effect of Case 3556 upon the one at bar and the fact upon which Appellants in their brief are "loudly silent" is that Appellants were dismissed from Case 3556 one week prior to judgment being entered in favor of Appellee and against the other defendants. The effect of this situation is to make Appellants total strangers to the judgment rendered in favor of Appellee and against the others in Case 3556.

Where a defendant is dismissed from an action before judgment the effect of the dismissal is the same as if the defendant had never been made a party.

Armbruster v. Hoff (Sup. Ct., Colo., en banc, 1953), 128 Colo. 74, 260 P.2d 601.

Holt Mfg. Co. v. Collins (1908), 154 Cal. 265, 97 Pac. 516, 519.

Page v. W. W. Chase Co. (1904), 145 Cal. 578, 79 Pac. 278.

Section 79 of the Restatement, Judgments, defines the conditions under which a party may claim a former judgment to be res judicata. In point is comment "f" under Section 79 which reads in part:

"A person who originally was a party or who has intervened in the proceeding but who, before judgment, is dismissed from the action, or is permitted to withdraw from it, is not affected by the judgment or by the decisions of any issues which have led to it."

Otherwise stated, there were two separate and distinct judgments rendered in Case 3556; one dismissing Appellants on January 10, 1955 and a second in favor of Appellee and against other defendants a week later on January 17, 1955 (Ex. 4). Appellants cannot claim anything for the second judgment to which they are total strangers. Nor can Appellants claim res judicata as to the second judgment through their assignor Holdorf Oyster Corporation who was a party defendant because with the assignment having been made prior to commencement of Case 3556 Appellants were never in privity with their assignor. Restatement, Judgments, Sec. 104; *Dakota Life Ins. Co. v. Midland Nat. Bank* (8 Cir., 1927), 18 F.2d 903, 904.

**Dismissal of Appellants in Case 3556 is
not basis for res judicata since different proof
was required there than in case at bar.**

Because different burdens of proof were required in Case 3556 than in the case at bar the former action which resulted in dismissal of Appellants cannot properly serve to bar Appellee from defending the present foreclosure suit.

It is well settled that in determining whether a former judgment is a bar to a subsequent action it is necessary to inquire whether the same evidence would have maintained both such actions. *Buddress v. Schafer* (1895), 12 Wn. 310, 41 Pac. 43. This is not only the best but is the most infallible criteria. *Curtis v. Crooks* (1937), 190 Wn. 43, 66 P.2d 1140, 1144. The fact that similar relief as here was sought in the former action makes no difference. *Viator v. Stone* (Miss., 1947), 29 So. 2d 274, 276.

Differences of required proof in Case 3556 and the one here are many. The most important difference is that in Case 3556 in order for Appellee to have had the note and mortgage cancelled she had to prove as she had properly alleged that Appellants as assignees of those instruments acquired them with *actual knowledge* of the fraud on the part of their assignor which rendered them voidable. In the case at bar in order to succeed Appellee had only to prove Appellants took by assignment (which they admitted) and that the note and mortgage were obtained by fraud of their assignor (which they also admitted).

In Case 3556 the district court took jurisdiction only by reason of a sale of securities in violation of Section 10(b) of the Securities Exchange Act of 1934 and the Commission's Rule X-10B-5. *Fratt v. Robinson* (9 Cir., 1953), 203 F.2d 627. As to cancellation of the note and mortgage Congress enacted Section 29(b) of the Securities Exchange Act of 1934 (15 USCA § 78cc(b)) which conferred jurisdiction upon the district court to cancel or render void instruments made in violation of the Act and Rule. However, in conferring this power on the court Congress expressly restricted its applicability so far as assignees of contracts were concerned to those situations where it could be proven that the assignees acquired such contracts with *actual knowledge* of the facts which rendered them in violation of the Act or Rule. The pertinent part of Section 29(b) of the Securities Exchange Act of 1934 (15 USCA § 78cc(b)) reads:

“(b) Every contract made in violation of this title or of any rule or regulation thereunder . . . shall be void

“(1) . . .

“(2) As regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation . . .”

Thus, Appellee in Case 3556 in order to cancel the note and mortgage and remove the cloud from the title to her Seattle home was required to allege and prove that not only were the note and mortgage obtained from her by fraud of Holdorf Oyster Corporation, Ap-

pellants' assignor but also that Appellants when acquiring the note and mortgage had *actual knowledge* of their assignor's fraud. In Case 3556 Appellee proved the note and mortgage were fraudulently obtained from her but failed to prove the most difficult but absolutely essential fact that Appellants took the instruments with *actual knowledge* of the fraud. This was the cogent reason why Appellants were dismissed from the case. Appellee had also alleged in Case 3556 that Appellants conspired with the other defendants in the scheme to defraud her of valuable securities including the note and mortgage. She failed to tie Appellants into the conspiracy which she established against the other defendants. Failure of this proof only saved Appellants from being tagged with the \$83,077.49 judgment entered against the other defendants. Even if Appellee had established Appellants as conspirators the Court would still have lacked jurisdiction to declare the note and mortgage void, short of proof of *actual knowledge* of the fraud on the part of Appellants.

Ironically, in Case 3556 it was the very necessity for Appellee to bring home *actual knowledge* of the fraud to Appellants which won for them a dismissal from that case but which at the same time made it inappropriate to serve as a bar to Appellee in this case. It must be remembered that almost simultaneously with Appellee's prosecution of her fraud action in Case 3556 the Appellants as plaintiffs were seeking to foreclose this note and mortgage as holders in due course in the Superior Court of the State of Washington for the County of King (Tr. 21, F. 11). The difference in proof was

clearly demonstrated when in Case 3556 Appellee was unable to reach Appellants with proof of fraud in connection with the execution of this note and mortgage but successfully defended the suit brought by Appellants in the state court by showing Appellants not to be holders in due course without proof of actual knowledge of fraud on their part.

Here, the Appellants have come into the district court as assignees only of the note and mortgage; they having been stripped of the status of holders in due course by their foreclosure suit in the state court. *Glaser v. Connell* (1955), 47 Wn. 2d 622, 289 P.2d 364. The state court action would have been *res judicata* against these Appellants here had not the complaint been dismissed without prejudice to give Appellants opportunity to either secure the lacking endorsement on the note and return as holders in due course or sue as they have as assignees. It means nothing in the case at bar that lack of *actual knowledge* of the fraud on part of Appellants is established. It is axiomatic that assignees can have no greater rights or title than their assignor and that they take notes and mortgage subject to the defense that the same were induced by fraud practiced by their assignor. *Willett v. Central Yakima Ranch Co.* (1913), 126 Wn. 587, 219 Pac. 20.

Other differences in necessary burdens of proof exist between Case 3556 and this one. For instance, proof of fraud in connection with the use of the mails or an instrumentality of interstate commerce was essential in Case 3556 for jurisdiction but not in the case at bar. Also, Appellee's proof that the procurement of the note

and mortgage from Appellee was a violation of Rule X-10B-5 of the Securities and Exchange Commission was considerably less than proof of common law fraud in the State of Oregon where the fraud was perpetrated. Compare Rule X-10B-5 (17 C.F.R. § 240-10B-5) with the nine elements of fraud set forth in *Conzelmann v. N. W. P. & D. Prod. Co.* (1950), 190 Or. 332, 225 P.2d 757. These, and perhaps further differences in proof, make it improper for the judgment of dismissal in Case 3556 to operate under the doctrine of res judicata as a bar to Appellee asserting in this case the defense of fraud.

Still, a further and statutory reason exists as to why any judgment in Case 3556 should not operate as a bar to Appellee in this case. Section 28 of the Securities Exchange Act of 1934 (15 USCA § 78bb) reads:

“(a) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. . . .”

In Case 3556 Appellee maintained her tort action for damages (not pecuniary restitution) under the Securities Exchange Act of 1934 upon the understanding, as above stated, that the remedy she there sought and obtained was a remedy in addition to any other rights or remedies at law or in equity which she might otherwise have had. One of these other rights was to defend

Appellant's second foreclosure suit upon the fraud of their assignor without being barred by the exercise of her additional remedy in Case 3556.

**No essential facts were litigated in
Case 3556 that could collaterally estop
Appellee in defending this case.**

While Appellants in their brief have not mentioned collateral estoppel by name they have intimated the doctrine might be applicable. Appellee wishes to meet such contention.

It is only where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment that the determination is conclusive between the parties on different causes of action. *Tyler Mining Co. v. Sweeney* (9 Cir., 1893), 54 Fed. 284; Restatement, Judgments, Section 68.

So far as this note and mortgage were involved there were only two essential facts litigated and determined in Case 3556 as between Appellee and Appellants and from which a judgment of dismissal was entered in favor of Appellants. The first fact was whether or not Appellants had actual knowledge of the fraud which tainted the instruments and the second was the fraud itself. The Court found in favor of Appellants on the first fact and dismissed them and later found in favor of Appellee against other defendants on the second fact. A third, but irrelevant fact was also put to rest in Case 3556. That fact was that Appellants were not conspirators with the other defendants in defrauding Appellee. The judgment of dismissal in favor of Appellants does

collaterally estop Appellee from re-litigating the issue of actual knowledge and the issue of conspiracy but nothing more.

The only useful purpose in the case at bar for which the fact of lack of actual knowledge and lack of conspiracy could serve Appellants (and not against them) would be as evidence—"mediate data" to prove good faith; an element to the doctrine of comparative innocence which is being asserted by Appellants. Lack of actual knowledge was admitted and found by the district court in this case but it in itself was not sufficient to avoid the ultimate finding of lack of good faith in the part of Appellants.

Thus, any express or implied findings of fact in Case 3556 which Appellants by reply might conjure cannot be used by Appellants to collaterally estop Appellee because such would not have been essential findings of an ultimate fact. At best, such facts would constitute only evidentiary facts—"mediate data" in the former case and not be of a quality to form the basis for a collateral estoppel. Or, perhaps, if by any chance such other facts be regarded as ultimate in Case 3556 they could only be useful in the case at bar as "mediate data." In either event, such other facts would be inadequate to establish collateral estoppel. *The Evergreens v. Nunan* (2 Cir., 1944), 141 F.2d 927, 152 ALR 1187.

We might mention here that there is no merit in Appellants' claim that the court in Case 3556 in cancelling the note as to Holdorf Oyster Corporation only in the January 17, 1955 judgment in favor of Appellee

inferentially constituted a finding that the note as then held by Appellants was valid. The only inference that could properly be drawn from that situation, if it is competent to draw any inference, is that Appellants had been dismissed from the case a week before because of failure of Appellee to bring home *actual knowledge* to them and that the Court cancelled the fraudulent paper only so far as it was able; not resurrecting Appellants' holder in due course status nor giving them a "bouquet" for holding paper tainted with fraud.

**Appellee's unsatisfied judgment against
Errion and others did not merge note
and mortgage so as to bar her
defense to Appellants' foreclosure suit.**

In Case 3556 Appellee has a judgment against Holdorf Oyster Corporation, Appellants' assignor in amount of \$83,077.48 which remains unsatisfied except to the extent of \$5,747.57 (Tr. 21). Although that judgment certainly merged the note and mortgage so far as Holdorf Oyster Corporation is concerned it definitely did not do so as to these Appellants. If it had they would not have been able to maintain the present foreclosure suit.

Freeman on Judgments (4th Ed) in § 562 at page 1193 of Volume 2 states the rule authoritatively and clearly:

"Though a judgment may merge a claim or cause of action so far as the parties to the action and their privies or those represented by them are concerned, as to third persons with respect to whom it is not *res judicata*, the claim or cause of action, though embodied in a written contract such as a note or mortgage, may still retain its existence and form the basis of a new action."

See also:

Petri v. Manny (1918), 99 Wn. 601, 170 Pac. 127.
Harrison v. Remington Paper Co. (8 Cir., 1905),
 140 Fed. 385, 394.

As we have already shown, Appellants were strangers to the Appellee's judgment and further, cannot in any way be said to be in privity with Holdorf Oyster Corporation. If the later was true the Appellee's judgment in Case 3556 which Appellants now claim bars Appellee from defending the case at bar would have been a complete bar against Appellants in the first instance maintaining this suit.

Appellee's judgment in Case 3556 which included damages for Errion encumbering Appellee's home did not bar Appellee in defending foreclosure suit by either election or merger.

An unusual situation confronted the district court in Case 3556 when it came to awarding damages to Appellee for the fraud perpetrated upon her by Errion, Holdorf Oyster Corporation and the other defendants (except Appellants). Appellants had been dismissed from the case. They held the note and mortgage at least by assignment and perhaps as holders in due course. If the latter, Appellee faced losing her home unless she could pay \$16,000 plus interest which Appellants were demanding in a foreclosure suit then pending in the Superior Court of the State of Washington. If Appellants were not holders in due course then probably after considerable vexation and expense Appellee could and would prevent foreclosure. In order to assure Appellee of adequate damages the trial judge, William J.

Lindberg, in Case 3556 included in the calculation of damages to be awarded against Errion, et al, \$16,000 plus accrued interest to January 17, 1955 on the note in amount of \$4,314.68 for a total of \$20,314.68 in making up a total award to Appellee of \$83,077.48 (Tr. 21). This judgment was not against Appellants and doesn't even to this day concern them.

There never was any opportunity for Appellee to have elected between clearing her home of this fraudulent encumbrance and taking a judgment reduced by \$20,314.68 or recognizing the validity of the note and mortgage and run her chances of collecting a judgment from Errion. Appellee was fighting on all fronts. It appears unconscionable to permit Appellants as "bad faith" holders by assignment of fraudulent paper to take over Appellee's home by foreclosure upon the proposition that she elected (when in fact she didn't and couldn't) to accept an unsatisfied judgment against Errion instead of a clear title to her home. Neither any theory of merger nor election of remedies require such an unfair result.

Appellants' position is no different than the person who acquires personal property from another who had previously converted it to his use from that of the true owner. In that situation, even where in a former action the true owner has secured a judgment for the full value of the property converted against the person who converted it, such a judgment cannot be pleaded as a bar so as to prevent the true owner, from suing and recovering the property from the person holding it.

Schwegman v. Neff (App. Ct., Ind., en banc, 1940), 218 Ind. Rep. 63, 27 N.E. 2d 397.

Ledbetter v. Embree (1895), 12 Ind. App. 617, 40 N.E. 928.

Freeman on Judgments (4th Ed), Section 577.

Neither does the election of remedy rule assist Appellants in taking advantage of Appellee by reason of her holding an unsatisfied judgment against Errior, et al., to which they are strangers.

Election of one remedy does not bar another unless they are inconsistent. *Union Trust Co. of Spokane v. Wiseman* (D. Ct., Ore., 1926), 10 F.2d 558. At best the doctrine of election of remedies is a harsh and now largely obsolete rule, the scope of which should not be extended. *Friederechsen v. Renard* (1917), 247 U.S. 207, 62 L. Ed. 1075. What is most important, however, is that because the doctrine of election of remedies is so similar to the doctrine of estoppel, the modern rule is that even when applicable the doctrine of election of remedies will not be applied until it is first shown by the party asserting such doctrine that he has been injured because of such election. *Pacific Coast Cheese v. Security First Nat. Bank* (Calif. S. Ct., en banc, 1955), 45 Cal. 2d 75, 286 P.2d 353; *Lake v. New York Life Ins. Co.* (4 Cir., 1955), 218 F.2d 394, 400. Obviously, Appellants cannot be injured by reason of Appellee holding an unsatisfied judgment against the "fabulous rascal."

Where two different actions are asserted against different parties seeking but one satisfaction such actions

are not inconsistent and one cannot serve as a bar to the other under the doctrine of election of remedies.

Title Guarantee & Trust Co. v. McIlwain (9 Cir., 1934), 73 F.2d 755.

Foshay Trust & Savings v. Public Utilities (8 Cir., 1933), 64 F.2d 665, cert. denied in 78 L. Ed. 566.

Lake v. New York Life Ins. Co. (4 Cir., 1955), 218 F.2d 394, 400.

Perkins v. Benguet Consol. Mining Co. (D. Ct., App. Calif., 1942), 55 Cal. App. 2d 720, 132 P.2d 70, 90.

Farmers and Merchants Bank v. Universal CIT (Utah, 1955), 289 P.2d 1045.

Of course, the case cited by Appellants, namely, *Hein v. Chrysler Corporation* (1954), 45 Wn. 2d 586, 277 P.2d 708, is clearly distinguishable from the case at bar in that both the Federal Court former action and the State Court second action were both against the same defendant; the plaintiff merely wanting to try the same cause of action on two theories and take the larger of two verdicts.

Still a further and complete answer to this problem of both merger and election of remedy is found in Section 28 of the Securities Exchange Act of 1934 (15 USCA § 78bb), as set forth on page 9 of this brief. It declares that Appellee's Case 3556 in which she secured her judgment was an additional remedy to any and all other rights and remedies which she might otherwise have had at law or in equity. At least Congress said she could assert her defense in this case until she had secured full satisfaction of that judgment. The latter she has not done.

DOCTRINE OF "COMPARATIVE INNOCENCE" NOT INVOLVED

In this case the Appellants, after having lost their standing as holders in due course of this note and mortgage in their previously maintained state court action are now seeking to gain the equivalent of their lost status under the equitable doctrine of comparative innocence. They say, that by reason of an estoppel in pais that Appellee cannot claim as a defense that the note and mortgage were fraudulently obtained from her because by Appellee's own negligence she executed and delivered the instruments to Errion making it possible for him to later assign such to them. As a consequence, they say, that as between two innocent persons—Appellants on the one hand and Appellee on the other, that they should prevail and be permitted to foreclose upon the note and mortgage in spite of being at best naked assignees of fraudulent paper.

Appellants did not act in good faith in acquiring the note and mortgage and are not in a position to even urge an estoppel in pais.

The trial court found upon competent evidence the following facts, among others (Tr. 19, F. 6):

“That plaintiffs (Appellants) exercised complete indifference and neglect and did not act in good faith at time they voluntarily purchased said note and mortgage from E. R. Errion in August of 1951 paying \$16,000 to Holdorf Oyster Corporation for the benefit of E. R. Errion. Plaintiffs relied upon other transactions with E. R. Errion and not said mortgage to secure repayment of their loan to E. R.

Errion. That plaintiffs did not procure a valid endorsement of the payee of said note at time they acquired it from E. R. Errion. Prior to or at time of acquiring said note and mortgage, plaintiffs knew the note was in default as to the payment of the first year's interest. At said time, plaintiffs made no inquiry or investigation as to title, taxes or ability of Marguerite L. Connell to pay said note when due. . . . Defendant, Marguerite L. Connell, was at all relevant times living upon said real property which plaintiffs knew."

As a matter of law with the above findings of fact which Appellants concede are supported by the evidence, Appellants do not have the "clean hands" sufficient to come into a court of equity and urge the equitable doctrine of comparative innocence; more technically called an estoppel in pais.

The necessity for Appellants to first show themselves free of negligence in urging their own affirmative excuse by way of comparative innocence for not being bound by the title of their assignor is well established as the law of the State of Washington. In the case of *Liska v. Beckmann* (1932), 168 Wn. 489, 494, 12 P.2d 599, the appellant there had purchased a mortgage from Osner & Melhorn, Seattle mortgage dealers, who represented the mortgage to be a first mortgage. Had an investigation been made a prior mortgage would have appeared of record although the assignment of the prior mortgage would not have so appeared. The mortgagee of the prior mortgage did not know of a renewal nor of an assignment of mortgage and had no contact with the appellant. The Supreme Court of Washington in not only refusing to apply the doctrine of comparative innocence

to assist the appellant because of her own negligence also held that the case of *Kiley v. Bugge* (1931), 165 Wn. 677, 5 P.2d 1038, which Appellants here rely so heavily upon, was not in point. The Court said:

“The doctrine that, as between two innocent parties, the person who made the fraud possible should suffer the loss, can not be successfully invoked in behalf of the appellant. Had appellant, as we said above, exercised the care required of her in the purchase of the mortgage she seeks to foreclose, she would have discovered the recorded mortgage of 1920 existing as a prior lien against the property. Respondent was in no position to warn the appellant. She did not know that Bjornstad had executed a new mortgage to Osner & Melhorn, and she did not know that that mortgage had been assigned by Osner & Melhorn to the appellant.

“*Kiley v. Bugge*, 165 Wash. 677, 5 P.2d 1038, is not in point. . . .”

Furthermore, carelessness is evidence of lack of good faith and lack of good faith for any reason also prevents a party from asserting the doctrine of comparative innocence. In *Thorp Finance Corp. v. Le Mire* (1953), 264 Wis. 220, 58 N.W. 2d 641, 44 ALR 2d 189 (at p. 195), the Court said:

“Since the doctrine of estoppel in pais is founded upon principles of morality and fair dealing and is available only for the protection of claims made in good faith, the party setting up an estoppel is himself bound to the exercise of good faith in the transaction and in his reliance upon the words or conduct of the other party. . . .

“Good faith is generally regarded, however, as requiring the exercise of reasonable diligence to learn the truth, and, accordingly estoppel is denied where the party claiming it was put on inquiry as

to the truth and had available means for ascertaining it, at least where the element of actual fraud is absent."

In the case at bar, Appellants knew the note was in default and that Appellee was living in the house upon which the mortgage rested. On the other hand Appellee had not realized she had delivered a mortgage to Errion (Tr. 73) and knew nothing about its assignment nor about the Appellants. Appellants at time of taking the note and mortgage by assignment had only to reach for a telephone or write a letter of inquiry (as they later did) in order to have had revealed to them the whole sad affair.

When the effect is to divest a person of an estate in land it is the policy of the State of Washington that the doctrine of estoppel in pais should be cautiously applied, and then only upon the most cogent and convincing evidence. *Finley v. Finley* (1953), 43 Wn. 2d 755, 264 P.2d 246, 252; *Murray v. Briggs* (1902), 29 Wn. 245, 259, 69 Pac. 767. The actual possession of real property gives notice to a mortgagee of whatever a prudent and reasonable inquiry would have revealed. *Nicholas v. Debritz* (1934), 178 Wn. 375, 35 P.2d 29. Having made no investigation or inquiry before taking the note and mortgage by assignment Appellants acted at their own peril and cannot now claim freedom from negligence or bad faith. *Di Giovacchini v. Teich* (N.J., 1943), 30 Alt. 2d 815; *Marsinger v. Geering* (N.J., 1940), 16 Atl. 2d 338. It is even bad faith to take a note knowing that the first installment of interest is past due and unpaid. *Fidelity Trust Co. v. Whitehead* (N.C., 1914), 80 S.E. 1065.

In addition to being negligent and acting with lack of good faith the court below found Appellants to be indifferent to the mortgage as a security in that they were looking for their security to an anticipated opportunity to exercise an off-set with Errion on real estate commission which they were to pay him (Tr. 102). Since Appellants were indifferent at time of acquisition they can hardly complain now just because their anticipated off-set with Errion did not materialize. Equity should leave Appellants exactly where they put themselves by their own negligence, lack of good faith and indifference.

Since Appellants have not exhausted legal remedy of securing endorsement and proceeding as holders in due course they cannot assert equitable doctrine of comparative innocence.

Appellants lost their standing as holders in due course because they had not procured an effective endorsement to the note. They had a right to such endorsement and under the law merchant could compel such. RCW 62.01.049. *Hanson v. Roesch*, 104 Wn. 257, 176 Pac. 349. In the previous suit the state court in effect dismissed Appellant's cause without prejudice to give them an opportunity to secure such endorsement and regain their status, if they could, as holders in due course. Instead of properly seeking their remedy at law as was clearly pointed out to them Appellants come to a court of equity and seek to substitute for their lost holder in due course status the equitable doctrine of comparative innocence. In doing so, Appellants have neither alleged nor have attempted to prove that they

had no clear, plain nor adequate remedy at law. For this reason Appellants have not qualified to assert the equitable defense (or excuse) of comparative innocence or invoke the equitable jurisdiction of the district court.

An available legal remedy must be exhausted before resort can be had in a court of equity; particularly where payment of money is sought. *Heine v. Levee Comrs.* (1874), 19 Wall. (U.S.) 655, 22 L. Ed. 223. In fact, the Judiciary Act of 1789 limits the equity jurisdiction of the Federal courts to those cases only where it is first shown that the party does not have an adequate and complete remedy at law. *Schoenthal v. Irving Trust Co.* (1931), 287 U.S. 92, 77 L. Ed. 185.

Both parties to this cause were not victims of Errion's fraud as facts do not show that Errion defrauded Appellants.

Appellants contend that both themselves and Appellee were innocent victims of frauds practiced separately upon each by E. R. Errion. Appellants admitted that Appellee was a victim of Errion's fraud. Appellee did not admit that Appellants were victims of fraud and in fact contended otherwise.

As to Appellants in Finding 6 (Tr. 19) the Court found that they had voluntarily purchased the note and mortgage from Errion and at the same time Errion had fraudulently misrepresented the validity of the note and mortgage to them. In settling findings Appellee pointed out to the trial court her view that a person could not consistently have voluntarily purchased a note and

mortgage and at the same time been induced to do so by fraud of the seller. The trial court thought otherwise and at Appellee's request specified in the findings the basis of fact in support of the fraud as follows (Tr. 20, Finding 6):

"E. R. Errion fraudulently misrepresented said note and mortgage to plaintiff by representing it was a valid note and mortgage, knowing at the time he had procured the same by fraud which he had practiced upon the defendant."

While we do not think this inconsistency, if one, is germane to a determination of whether or not the doctrine of comparative innocence should be applied we do contend that as a matter of law the facts found do not show actionable fraud and if a choice must be made that this court is for that reason justified in adopting the finding that Appellants voluntarily acquired the note and mortgage and not because of fraud.

At common law it has long been settled that assertions of bonafideness of notes and mortgages constitutes at best "dealer's talk" and not actionable misrepresentation of any material fact; so essential to form the basis of actionable fraud.

If, as we contend, the court in *Ackerman v. Bramwell Inv. Co.* (1932), 80 Utah 52, 12 P.2d 623, correctly held that the payee of a promissory note was not chargeable with actionable fraud in telling the assignee thereof at time of selling it to him that the note was "as good as gold and that he would see that the assignee did not lose a penny on the note" then Appellants in the case at bar were not defrauded by any assertions which

Errion might have made to them as to the validity of the note and mortgage. The trial Court's finding above quoted involves only "dealer's talk"; not a misrepresentation of a material fact. Appellants here were no more defrauded than the purchaser of a dragline who bought upon the representation of the seller that the dragline was "in good shape," *Getty v. Jett Ross Mines* (1945), 23 Wn. 2d 45, 159 P.2d 379, or the purchaser of a note from a bank when the bank teller assured him that the note would be paid at maturity, *Rardon v. Davis* (Mo. App., 1932), 52 S.W. 2d 193. Since the note and mortgage upon their face speak validity the assurances of Errion, particularly if impressive enough to be relied upon should have put Appellants on inquiry; not make them the "innocent" victims of fraud in the transaction.

Doctrine of comparative innocence is not applicable where note and mortgage are fraudulently procured in the first instance.

Assuming Appellants did have "clean hands" and did have so exhausted their legal remedy as to come into equity so as to assert affirmatively that an estoppel in pais be invoked against Appellee, such equitable doctrine should not be applied here against Appellee because she did not voluntarily entrust Errion with the note and mortgage but rather the instruments were fraudulently procured from her by fraud of Appellants' assignor.

If Errion had procured the note and mortgage from Appellee at the point of a gun or by duress such as blackmail Appellants we believe would not have the

temerity to urge the doctrine of comparative innocence. Procurement of the note and mortgage by fraud is no different than armed robbery or blackmail except in degree. In neither situation could it be said that the instruments were voluntarily entrusted and for this important fact the doctrine of comparative negligence cannot be invoked by Appellants.

It is to be observed that procurement of the note and mortgage from Appellee by fraud was admitted and not undertaken to be proven by Appellee. Also, it is to be observed that while the district court found Appellee negligent it did not find that Appellee voluntarily delivered the note and mortgage to Errion as in the case of Appellants voluntarily acquiring the note and mortgage thereafter from Errion. Nor, was Appellee found to have acted with lack of good faith or with indifference as in the case of Appellants (Tr. 20, F. 8).

This distinction between voluntarily entrustment and fraudulent procurement of choses in action in regard to applicability of the doctrine of comparative innocence was first made in 1893 in the old "lightning rod" cases. In *Hill v. Thixton* (Ky., 1893), 23 S.W. 947, the defendant had executed under fraud and duress a note together with a "certificate of no defense" and the assignee for value pleaded the doctrine of comparative innocence claiming he had relied upon the certificate and that the defendant, rather than he, should suffer the loss. In distinguishing a prior decision where in the certificate of no defense had been voluntarily given instead of having been fraudulently procured the Court said:

“The case of *Wells v. Lewis*, 4 Metc (Ky) 269, cited against this view, was where neither the note nor the accompanying paper was attacked for fraud. The consideration alone of the note was sought to be impeached, and its makers, having voluntarily given the certificate that they had no offset, in order to give currency to their paper, would have been guilty of perpetrating a fraud on the innocent holder if defense had been allowed. *If the note and its accompanying ‘letter of credit’ were executed voluntarily, and free from imposition and fraud, then recovery should be had; if the note or its certificate of good character were not so obtained, then whatever defense, discount or offset, might have been used against the original obligee, may be used against the assignee.*” (Emphasis ours)

Another reason why Appellee should not be estopped is that she did nothing to mislead the Appellants. All she did in the first instance was sign and deliver to Errion the note and mortgage under compulsion of fraud; nothing more. Had she thereafter voluntarily done something else such as to give “a certificate of no defense” or ask Appellants for an extension of time within which to pay the note then Appellee might properly be estopped from asserting fraud as a defense because by her conduct she directly misled Appellants. However, this is not the case at bar and serves as another cogent reason why the district court refused to invoke an estoppel in pais upon Appellee.

Before a misrepresentation can arise to form the basis for an estoppel in pais such misrepresentation must be outside of the face of the obligation itself. In *Securities Holding Co. of Beresford v. Christensen* (S.D., 1928), 219 N.W. 949, the assignee of a note admitted

that it had been fraudulently procured, just as Appellants do here, but then contended that because the maker of the note had given a written certificate authorizing any bank to purchase with no "offset or condition" that the maker was estopped from asserting the fraud in the procurement of the note. The certificate was obtained from the maker along with the note and the court treated both as and in effect one instrument. It then said:

"In 21 C.J. 1143 it is said that where a person liable on a note states to a prospective purchaser or assignee that the obligation is valid and that there is no defense to it, he is estopped to resist payment in an action by such person who had taken the paper on reliance on his representation, but it is further said that 'to render this rule operative' the representations must be outside of the face of the obligation, and, even though they are thus disconnected, if they are made simultaneously with the execution of the obligation, so that there is in effect but a single transaction, no estoppel will arise.' "

See also:

American Nat. Bank v. A. G. Somerville, Inc.
(1923), 191 Cal. 364, 216 Pac. 376.

First Acceptance Corp. v. Kennedy (Iowa, 1951),
95 F. Supp. 861, 878.

We have carefully reread each of the Washington decisions cited by Appellants in their brief and find without exception that each involves a situation where a person in position of this Appellee voluntarily and without the imposition of fraud entrusted negotiable or assignable instruments to an agent who breached his trust by selling to another completely innocent person.

For reasons that are apparent those cases as so cited by Appellants are not in point with the case at bar.

Although the facts are somewhat involved we invite the Court's attention to *Willett v. Central Yakima Ranches* (1923), 126 Wn. 587, 219 Pac. 20, as being close in point with the case at bar. In that case the assignee bank had taken a land contract (similar to a mortgage) as security for a promissory note that was not endorsed by the bank's assignor. In rejecting the doctrine of comparative innocence for the universal rule that an assignee's title can be no greater than its assignor the Court said:

"Again, the title of an assignee to a non-negotiable chose in action, assigned to secure the payment of an obligation, can rise no higher than its source. In this instance, as we have stated, the assignment was made by the original owners to secure the payment of a specifically described promissory note. This note, while delivered to the bank by the assignees, was not endorsed by them. Under the almost universal rule, the bank took the note subject to all of the defenses that attached to it in the hands of the original payee. (See note to *First Nat. Bank v. McCullough*, 50 Or. 508, 93 Pac. 366, 126 Am. St. 758, 17 L.R.A. (n.s).")

Recovery in Washington under the doctrine of comparative innocence has been denied in the following cases:

Doub v. Rawson (1927), 142 Wn. 190, 252 Pac. 920.

Liska v. Beckmann (1932), 168 Wn. 489, 494, 12 P.2d 599.

Eastonville State Bank v. Marshall (1932), 170 Wn. 503, 17 P.2d 14.

Rumpf v. Barton (1894), 10 Wn. 382.

FINDINGS OF FACT ARE SUPPORTED BY THE EVIDENCE

Contrary to Appellants general contention the findings of the court below are amply supported by the evidence and were not induced by any erroneous concept of the law.

The evidence does show that Appellee knew she had with reluctance signed a note but did not realize until long afterwards that she had also signed a mortgage (Tr. 73).

Finding of Fact No. 7 (Tr. 20) is in reality a conclusion of law for the same reason the state court had found "holders in due course" to be a conclusion of law. *Glaser v. Connell* (1955), 47 Wn. 2d 622, 289 P.2d 364. Whether law or fact the finding is nevertheless correct in that Appellants' legal ownership of the note and mortgage was always subject to the fraud of their assignor.

As pointed out earlier no inference can be drawn to conclude that the district court in Case 3556 found that Appellants were the owners of the note just because it cancelled the note only as to the interest of their assignor.

Finding of Fact No. 8 (Tr. 80) to effect that Appellee had at no time conducted herself by any acts or omissions so as to mislead or prejudice Appellants and give rise to an estoppel is well supported by the simple fact that neither parties had contact of any nature with the

other. Although Appellants at all times had knowledge of Appellee, Appellee at no time had knowledge of the Appellants.

CONCLUSION

Appellee's fight to remove the fraudulently obtained mortgage as a cloud on the title to her Seattle home has been long and hard. In each encounter she has been biting at Appellants' heels, so to speak; with some but not complete success. The Appellee in her Case 3556 established the fraud but failed to bring home to Appellants actual knowledge. It didn't aid her *res judicata*wise but unquestionably induced the admission that the note and mortgage were tainted with fraud. In *Glaser v. Connell* (1955), 47 Wn. 2d 622, 289 P.2d 364, appellee, while not establishing the fraud, did strip Appellants of their status as holders in due course. With Appellants finally cut down to their true size—naked assignees of fraudulent paper, Appellee, at least in the court below has been able to consolidate her gains in the prior litigation and end the five year battle for survival.

Appellee prays that this court in its wisdom affirm the judgment of the court below. There is no legal principle of *res judicata* and certainly no equitable principle of estoppel in pais that requires this court to reverse the judgment of the court below. We have refrained from speaking factualwise of comparative innocence but contend it is just the opposite to which Appellants by their brief would lead their court to believe. Suffice to

say, Appellee, for five long years and while in her eighties has fought "the fabulous rascal" on all fronts and that is more than Appellants can say.

Respectfully submitted,

WILLIAM F. WHITE,
WHITE, SUTHERLAND & WHITE,
1100 Jackson Tower,
Portland, Oregon,

MALCOLM S. MCLEOD,
Dexter Horton Building,
Seattle, Wash.,

Attorneys for Appellee.



**United States
Court of Appeals
For the Ninth Circuit**

EINAR GLASER and DOROTHY GLASER,
Appellants,
vs.
MARGUERITE L. CONNELL,
Appellee,
WILLIAM F. WHITE and JANET D. WHITE,
Defendants.

Appellants' Reply Brief

**Appeal from the United States District Court for the
Western District of Washington, Northern Division.**

HON. GEO. H. BOLDT, Judge

LEO LEVENSON,
NORMAN B. KOBIN,
Portland, Oregon

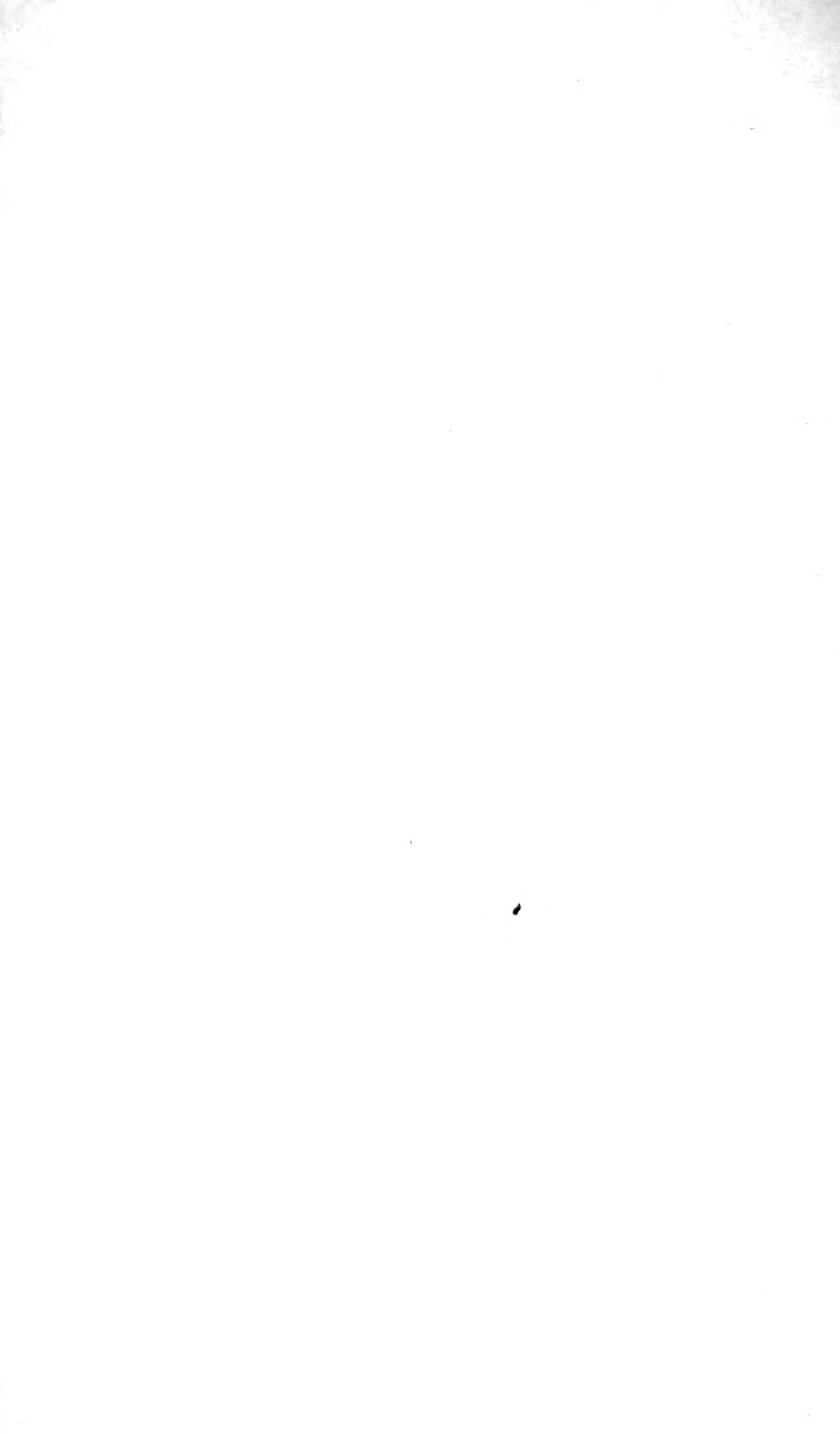
WAYNE W. WRIGHT,
LAYTON A. POWER,
Seattle, Washington,
Attorneys for Appellants.



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**United States
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Appellants,
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Appellee,
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Defendants.

Appellants' Reply Brief

**Appeal from the United States District Court for the
Western District of Washington, Northern Division.**

Res Judicata — Collateral Estoppel

I.

Appellee, (page 2) in her brief, contends that the nature of Case No. 3556 (Exh. 4) was such that it cannot possibly constitute a bar to this case upon the theory of res judicata, collateral estoppel, etc. It is claimed appellants were dismissed from that case one week prior to judgment being entered therein in favor of

appellee and against the other defendants and because of that dismissal, it resulted in making appellants total strangers to the judgment.

In support thereof appellee cites Sec. 79 of the Restatement, Judgments, and authorities of Colorado and California courts. An examination of those authorities clearly reveals they have no application for the reason they refer to cases not tried on the merits, but were dismissed for either a jurisdictional reason or a party dismissed from the case was not a party interested in any of the issues. Those situations, however, did not in any degree exist in Case No. 3556. Appellants were parties in Case No. 3556 who were relieved of liability after a complete trial on the merits and issues. Exhibit 4 in this case at bar contains a copy of the Judgment Order dated January 10, 1955, disclosing that a trial on the merits resulted favorable to appellants. The exhibit also contains the Findings of Fact and Conclusions of Law dated January 17, 1955. Finding of Fact No. 33 and Conclusions of Law No. 2 confirms the judgment on the merit as to appellants.

Thus, every contention raised by appellee in this case at bar as a defense, and every question of fact essential to a judgment was actually litigated and determined in Case No. 3556.

In the recent case of **Hoag v. New Jersey**, 356 U.S.

-----, 2 L. Ed. 913, 78 S. Ct., Mr. Justice Harlan, re-emphasized the principle of collateral estoppel:

"A common statement of the rule of collateral estoppel is that 'where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action.' Restatement, Judgments, Sec. 68 (1). As an aspect of the broader doctrine of res judicata, collateral estoppel is designed to eliminate the expense, vexation, waste, and possible inconsistent results of duplicatory litigation. See *Developments in the Law—Res Judicata*, 65 Harv L Rev. 818, 820."

For the reasons above stated, appellee's contention that appellants were strangers to Case No. 3556 is untenable.

II.

On pages 5-8 of appellee's brief, as another specious reason to assume that Case No. 3556 is not res judicata, it is claimed that in order for her to have had the note and mortgage cancelled she was required to prove in said cause that appellants accepted those instruments with actual knowledge of the fraud. This Court, in **Errion, et al v. Connell**, 236 F. 2d 447, disposed of that viewpoint when it sustained the plenary jurisdiction of the lower court.

"It is alleged in the complaint in our case, and

the trial court found, a **single cause of action** involving a **single fraudulent scheme** to defraud Mrs. Connell of her property. There were involved two types of property, one being securities over which the federal court had jurisdiction, and the other non-securities over which the federal court normally has no jurisdiction. But the single fraudulent scheme arising out of the same set of facts encompassed both types of property. The thought of requiring two law suits in this situation is untenable. We therefore hold that the trial court could correctly award damages for the entire fraudulent scheme, even though non-securities were involved."

On page 9 of appellee's brief she refers to Sec. 28 of the Securities Exchange Act of 1934, and contends it authorizes her to relitigate all the facts a second time. It must be borne in mind that appellee elected to join appellants as parties in Case No. 3556. She submitted for determination appellants' rights in the note and mortgage.

In our opening brief, page 16, et seq., we point out that appellee not only demanded pecuniary restitution and received it, but also demanded a cancellation of the note and mortgage. In Case No. 3556, the trial court awarded appellee relief by way of pecuniary restitution, in lieu of cancellation. Appellee did not appeal therefrom, and she is thereby, and ought to be, estopped by the principles of res judicata and collateral estoppel.

On Page 10 of appellee's brief it is claimed that no

essential facts were litigated in Case 3556, and hence, the doctrine of collateral estoppel is inapplicable. This is contrary to the facts. The court in that case had before it the issue of cancellation of the note and mortgage, or in lieu thereof pecuniary restitution. The court recognized appellants were the lawful owners and holders of the note and mortgage, and having found them innocent of any wrongdoing, entered a judgment against Errion, et al, for the value thereof, after allowing as a credit the value of the properties restored by him to appellee. For a further explanation the Court is respectfully referred to pages 19-21 of our opening brief.

Thus, collateral estoppel is a most important aspect of this case. This principle of law being designed to eliminate the expense, vexation, waste, and possible inconsistent results of duplicatory litigation, is pertinent and decisive of the issues in this case.

Estoppel in Pais

I.

Appellee contends it was necessary for appellants to show themselves free of negligence before urging the equitable doctrine of comparative innocence or estoppel in pais and in support thereof, cites **Liska v. Beckmann**, 168 Wn. 489, 12 P. 2d 599. A reading of that case discloses it to be inapposite. That case in-

volved the question of priority between two mortgagees as assignees of a common assignor of mortgages covering the same real property. The assignor was an embezzler. A son-in-law of the plaintiff mortgagee was an employe of the embezzler. The court found that the plaintiff should have examined the record of titles in the county auditor's office and if she had done so would have learned of the prior unsatisfied mortgage. This conduct on her part deprived her of the application of equitable estoppel.

The case at bar has no such factual background. Had appellants in this case examined the county auditor's office records they would have found that appellee was the record owner of the property, subject to a \$16,000 mortgage to Holdorf Oyster Corporation. Thus, there is absolutely no evidence that appellants were negligent. They displayed the same confidence in Errion, the Master of Chicanery, as had appellee, and were led to believe that appellee's note and mortgage were genuine.

They were, in fact, genuine insofar as appellee was concerned, for she, as a responsible person, gave them to Errion as part of a business transaction whereby she obtained from him a re-conveyance of her property. He was then retained as her agent to sell this property so she could realize \$20,000 and she agreed he was to have \$16,000 out of the deal. She entrusted him with

the note and mortgage and he violated his trust by pocketing the \$16,000 after assigning the instruments to appellants.

To analyze and distinguish all of appellee's authorities would extend this brief to no end. The Washington authorities cited by us in our opening brief are on all fours with this case at bar.

II.

Appellee disingenuously also charges appellants with lack of good faith for being ensnared by Errion, notwithstanding her sole defense is predicated upon a similar technique utilized by him to ensnare her.

Appellee is of the age of 88 and a widow and this does engender sympathy for her plight. However, in considering this case and the relief sought, the issue before the Court is, who should bear the loss where both parties were victims of a Master of Chicanery?

Appellee's Association, Acts and Conduct with Errion.

1. Errion was introduced to her as a salesman who could sell snowballs in Hades—a clever man.

2. In 1949 she willingly and knowingly, but improvidently, transferred to him all her properties.

3. She had consulted a Dr. Kincaid who cautioned her against associating with Errion.

4. Errion's countless and shabby promises did not arouse her suspicions about him.

5. Coos County, Oregon condemnation proceedings did not materialize as he had assured her would result in a substantial profit.

6. She kept after him constantly for money and all she received were alluring promises.

7. She first heard of Einar (appellant) and McKenney, when she demanded monies of Errion and he told her he was in a big logging deal for them, there was about 55 heirs involved etc. All this tempted appellee.

8. Errion discouraged her from buying another home.

9. She demanded \$20,000 for her property.

10. Errion represented he could get her \$20,000, as follows:

. . . I have a logger who has a large family. He wants to send his boy to the University of Washington. He will pay you \$36,000 for the home. I will sell it to him for this price and you will get \$20,000 and I will get \$16,000. I will convey the house back to you. You will execute a deed to him and you will also execute a note and mortgage for \$16,000 to me. (Holdorf Oyster Corporation) . . .

11. At the time the note and mortgage were to be executed, she resisted because they were predated one year. Errion told her it would appear more plausible if the note were predated.

12. She asked him why she should be required to sell the property and he told her it would make it more attractive for the purchaser if she had the title.

13. She strenuously objected to putting the note and mortgage into circulation for she was concerned about not being able to pay it and would lose the property.

14. Appellee suffered no detriment as a result of this transaction. She had been deprived of this \$45,000 property in 1949. As a result of the note and mortgage transaction she was vested with title and deducting the amount of the mortgage, she benefited to the extent of \$29,000.00.

Appellants' Acts and Conduct

1. Errion secured their confidence by virtue of a beguilement technique as was applied to appellee. After managing to ensnare them into his confidence he succeeded in persuading their purchase of the \$16,000 note and mortgage and pay him the full value therefor.

2. They did not question the explanations of his possession of the note and mortgage and if they had examined the county auditor's deed records it would have reflected the actual situation, to-wit: appellee was the owner of the property which was subject to the \$16,000 mortgage.

3. Value of security. An investigation by appellants would have disclosed that the property was worth substantially more than the amount of the mortgage and that the security was adequate.

4. If any inquiry had been made of appellee the only fair and reasonable inference to be drawn from the record is that she would have unquestionably ratified the transaction for she already had been conditioned to approve it in the event appellants contacted her. Of course, she was vitally concerned in obtaining \$20,000.00 for herself.

III.

In comparing the acts and conduct of appellee with the acts and conduct of appellants, we believe it is a fair statement in concluding, that appellee's entire experiences with Errion and his intriguing swindles, were such that she had notice of facts such as would put a reasonably prudent person upon inquiry, whether to continue in a business association with such a rogue. It is not a question whether she had the means of obtaining and by prudent caution have obtained knowledge that he was in fact a swindler, but she admitted under oath when she executed the note and mortgage, she believed he and his crowd were, in fact, frauds and scoundrels. With full knowledge of his predilections she freely continued to transact business with him and placed into his hands her negotiable \$16,000 note and mortgage. Her acts and conduct, at that time, were those of a person of responsibility and competence and were acts of gross and culpable negligence.

On the other hand, in what way were the appellants guilty of any carelessness or wrongdoing? If they had had the courthouse records examined with reference to the title to appellee's property prior to purchasing the note and mortgage, they would have found it belonged to appellee and subject to a \$16,000 mortgage. There would be nothing in the records of the county auditor to suggest any impropriety. In fact, appellee

admits the note and mortgage were genuine at the time she executed them and that they were deliberately executed as part of a business transaction with Errion.

We do not believe any person in the position of appellants would believe there was anything about the note and mortgage to excite inquiry. The presumption is in favor of legal conduct and not in favor of violations of obligations. It was more natural for appellants to assume that Errion acted rightfully on account of his general relationship to them, and bearing in mind, **that at that time**, appellants were wholly unaware he was a rogue, although appellee was fully cognizant of his umbrageous character. In this regard, **Tobey v. Kilbourne**, 222 Fed. 760 (9) is pertinent and has parallel features to this case at bar and this Court affirmed a decree refusing to set aside a conveyance of land obtained by fraud. In answer to a question of a witness whether, in dealing with a corporation claiming to own property, where it claimed its resources consisted of real estate, it would not be a person's duty as a business man to investigate, the witness said:

"It might be. It would vary under different circumstances according to the degree of confidence I had in them, and I certainly had a good deal in Mr. De Larm (The confidence man). At that time he impressed me very favorably indeed."

In speaking of De Larm, the witness further stated:

"He made a great many promises that he never carried out, and still he had a way about him that, up until January, 1912, I really believed the fellow was sincere and honest, and would carry out his scheme."

CONCLUSION

Since the filing of our opening brief, Case No. 15689, Helen A. Davenport, appellant, vs. United States of America, appellee, has been filed with the Court. It is another swindle involving Errion. The facts in that case, and all the cases cited by us on page 4 of our opening brief, indubitably establishes him as a fabulous rogue. From it all, it is clearly understandable why appellants were induced to pay over \$16,000. The acts and conduct of appellee in placing the note and mortgage in his hands were the roots from which he gathered some of his crop.

The equities are with appellants and the decree of the lower court should be reversed.

Respectfully submitted,

LEO LEVENSON,

NORMAN B. KOBIN,

Portland, Oregon.

WAYNE W. WRIGHT,

LAYTON A. POWER,

Seattle, Washington,

Attorneys for Appellants.

**United States
Court of Appeals
For the Ninth Circuit**

EINAR GLASER and DOROTHY GLASER,
Appellants,

vs.

MARGUERITE L. CONNELL,
Appellee,
WILLIAM F. WHITE and JANET D. WHITE,
Defendants.

Petition for Rehearing

LEO LEVENSON,
NORMAN B. KOBIN,
Portland, Oregon
WAYNE W. WRIGHT,
LAYTON A. POWER,
Seattle, Washington,
Attorneys for Appellants.

FILED

JAN 16 1959

PAUL P. O'BRIEN, CLERK

**United States
Court of Appeals
For the Ninth Circuit**

EINAR GLASER and DOROTHY GLASER,
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vs.
MARGUERITE L. CONNELL,
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WILLIAM F. WHITE and JANET D. WHITE,
Defendants.

Petition for Rehearing

TO: The Honorable James Alger Fee, William Healy
and Oliver D. Hamlin, Jr., Circuit Judges:

Appellants hereby petition this Honorable Court for
a rehearing of the within appeal, the judgment on
appeal having been filed December 17, 1958.

I.

The Court incorrectly transposed the basic facts and
because of this, it resulted in its ultimate conclusion
being based upon a faulty premise.

ARGUMENT

In applying the law to the facts of a case, it is vital that the evidence be appraised in its true and proper setting. Here the Court incorrectly transposed the basic facts and because of this error, the ultimate conclusion is without a foundation to support it.

In stating, "The Glasers knew that Errion was an accomplished confidence man and a fabulous rascal," the Court could only have reached this conclusion by incorrectly taking the facts out of their true sequence of circumstances and/or events.

Neither the Findings of Fact or the evidence support a conclusion that the Glasers knew of Errion's fabulous character until they had already been conned of many thousands of dollars. And their knowledge of Errion's fabulous character, as the evidence without dispute shows, only came **after** March^d 17, 1952. This was long after appellee, with prior knowledge of Errion's fabulous character, placed in his hands her \$16,000 note and mortgage.

CHRONOLOGY

By Findings of Fact No. 6 (Tr. 19), Glasers purchased the \$16,000 note and mortgage involved in this cause from Errion in August, 1951, paying Holdorf Oyster Corporation \$16,000. On that occasion, there

is no evidence they were aware of Errion's fabulous character. The Court's conclusions are inconsistent with the Finding of Fact. It was not until the Spring of 1952, or later, when Glasers began to realize that Errion was a confidence man and they were being duped. In this regard, the Court is respectfully referred to its opinion in **McKenney v. Buffelin Mfg. Co.**, 232 F. 2d. 5, where it appears that it was during the year 1951, Glaser and his partner McKenney, **fell** into the hands of Errion who "led them to the point of no return" . . .

Also, the credulity of Glasers in relation to being conned by Errion, is clearly manifested by Findings of Fact No. 3 (Tr. 22) appellee's counter-claim. It appears therefrom that on March 17, 1952, Einar Glaser executed and delivered to an alter ego of Errion, (the National Forest Products Corporation), a promissory note for \$20,000, which note was obtained from him in exchange for his own money upon false and fraudulent representations of Errion, which note was subsequently transferred to and accepted by appellee, who had full knowledge then of Errion's fabulous character.

By Findings of Fact No. 9 (Tr. 24), appellee was aware of the background of Errion and Holdorf and that they had the general reputation of cheaters and defrauders and were confidence men and had swindled

her and others. The record reveals, without dispute, that Errion had been engaged in perpetrating his fraud upon appellee, commencing in 1949 and by January, 1951, and before she voluntarily and knowingly placed her \$16,000 note and mortgage in his hands (Tr. 66), she was fully cognizant he was a confidence man. In this respect, the Court erroneously stated, "She made no representations, false or otherwise, to the Glasers."

It was to recover a part of her property conned from her that she entered into a scheme with Errion on his representation of a quick sale of her property. By her employment of Errion and placing in his hands the \$16,000 note and mortgage, such conduct unquestionably and, at least, vicariously constituted representations upon which the Glasers relied; c.f. **Hutson v. Walker**, 37 Wn. 2d., 12, 221 P. 2d, 506, where the plaintiff entrusted an automobile to a wrongdoer and executed a blank certificate of title.

Conversely, there is not one word of testimony in this cause that Glasers had any prior knowledge of Errion's chicanery and that he was "an accomplished confidence man and a fabulous rascal." As we have stated, it was not until sometime **after** March 17, 1952, the day Errion returned \$20,000 to Glaser—Glaser's own money—at which time Errion conned Glaser into

executing the \$20,000 note. Findings of Fact No. 3 (Tr. 22).

Between August, 1951, when Glasers paid over \$16,000 to Errion for appellee's note and mortgage and March 17, 1952, when the \$20,000 note was executed, Glasers were veritably Errion's victims. Between the same period of time, it was appellee who was then fully cognizant she had been defrauded by Errion and he was "'an accomplished confidence man and a fabulous rascal."

Given these undisputed facts in their true chronological sequence, the conclusion of the Court concerning the inapplicability of the maxim, "when one of two innocent parties must suffer a loss, it must be borne by the one whose conduct rendered the injury," is manifestly erroneous and clearly negates a well established and recognized equitable principle.

II.

The Court in its opinion also stated, "Their failure to make any investigation after they knew the facts sufficient to charge them with notice defeat recovery."

The record unequivocally shows that Glasers had no knowledge that "Errion was an accomplished confidence man and a fabulous rascal" until **after** March 17, 1952. By that time, they had already been swindled

and duped out of many thousands of dollars, including the purchase of the \$16,000 note and mortgage here involved. Any knowledge of Errion's fabulous character by the Glasers was long **after** the time appellee had employed him to sell her home and placed in his hands the aforesaid \$16,000 note and mortgage with full knowledge of his incredible mendacity.

Because of the incorrect transposition of the chronological sequence of the undisputed facts and circumstances in this cause, the opinion of the Court is manifestly faulty and without any genuine foundation to support its ultimate conclusions.

As litigation is pending in other courts involving Errion's machinations resulting in substantial monetary losses to Glasers, it is of extreme importance that the opinion of this Court not be seized upon as an authority, particularly where the Court stated the evidence out of its chronological sequence.

Pursuant to Rule 23, appellants petition this Court for a rehearing.

Respectfully submitted,

LEO LEVENSON,

NORMAN B. KOBIN,

WAYNE W. WRIGHT,

LAYTON A. POWER,

Attorneys for Appellants.

CERTIFICATE OF COUNSEL

Leo Levenson, Norman B. Kobin, Wayne W. Wright and Layton A. Power, attorneys for appellants, hereby certify that in our opinion the above petition for rehearing is well founded and is not interposed for delay.

LEO LEVENSON,
NORMAN B. KOBIN,
WAYNE W. WRIGHT,
LAYTON A. POWER,
Attorneys for Appellants.

No. 15921 ✓

United States
Court of Appeals
for the Ninth Circuit

HYACINTH FLICKINGER, Appellant,

VS.

DONALD McGAVICK, Trustee in Bankruptcy of
the Estate of Hyacinth Flickinger, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Southern Division

FILED

AUG - 4 1958

PAUL P. O'BRIEN, CLERK

No. 15921

United States
Court of Appeals
for the Ninth Circuit

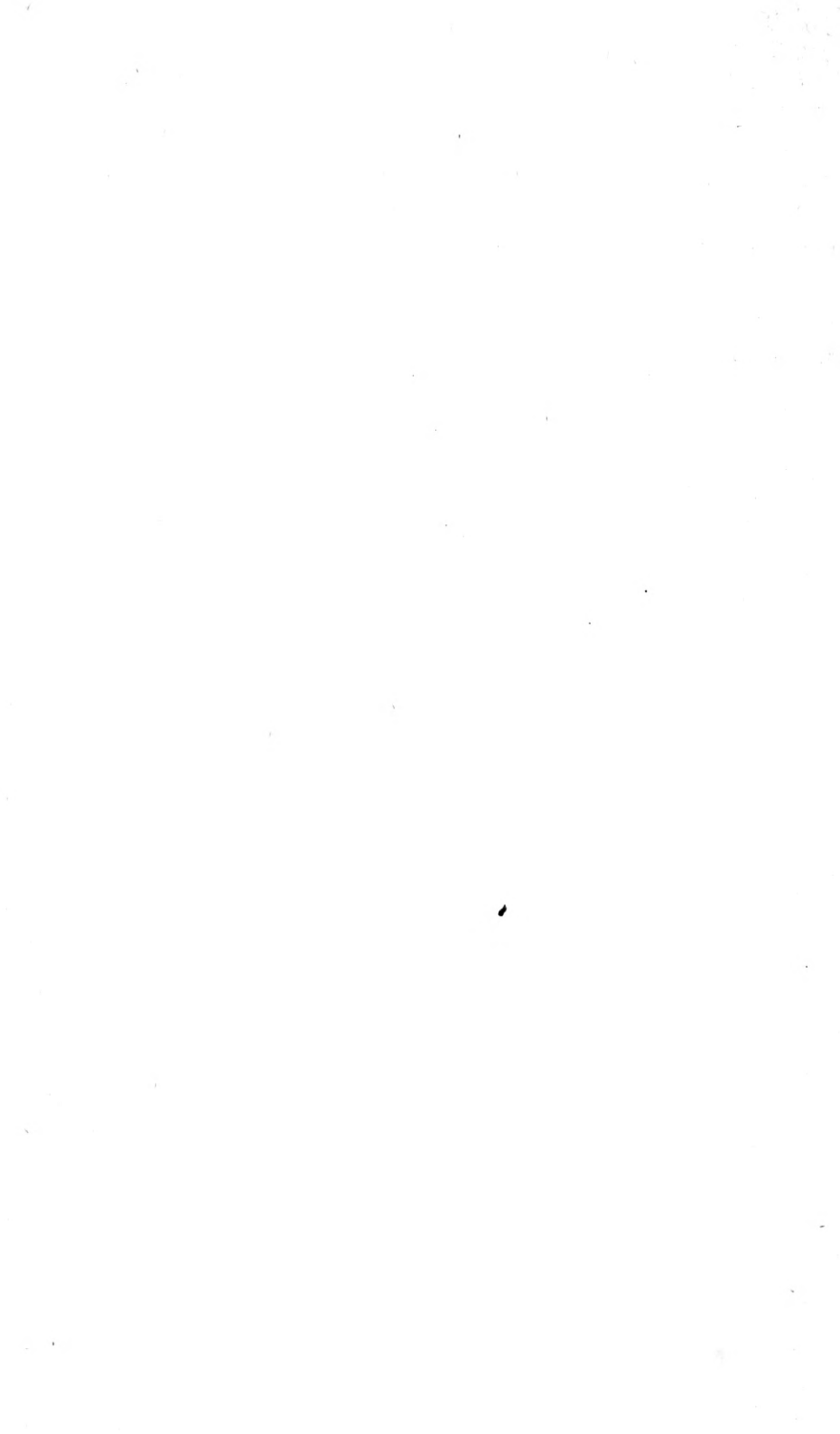
HYACINTH FLICKINGER, Appellant,

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the Estate of Hyacinth Flickinger, Appellee.

Transcript of Record

Appeal from the United States District Court for the
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

O. O. McLANE,
J. PETER P. HEALY,

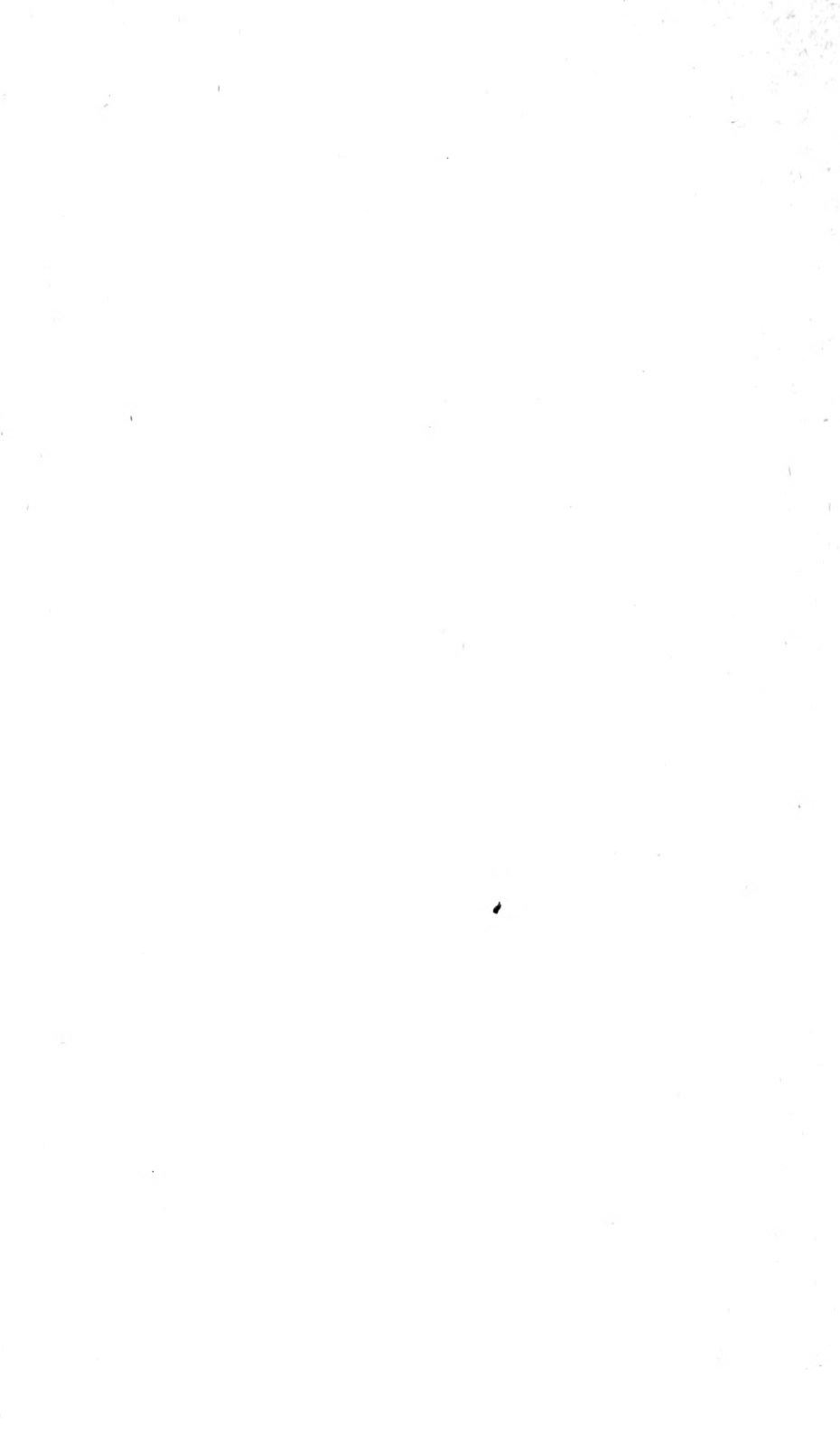
918 Puget Sound Bank Building,
Tacoma, Washington,

Attorneys for Bankrupt, Hyacinth
Flickinger.

DONALD H. McGAVICK,

510 Perkins Bldg.,
Tacoma, Washington,

Attorney and Trustee in Bankruptcy.



In the Superior Court of the State of Washington,
in and for the County of Pierce

No. 62579

In the Matter of the Estate of
FREDRICK F. FLICKINGER, Deceased.

ORDER AWARDING TO AND SETTING
OVER TO THE SURVIVING SPOUSE
ALL OF THE PROPERTY OF THE
ABOVE ENTITLED ESTATE

This Matter coming on regularly to be heard in open Court on March 26, 1957, upon the petition of Hyacinth M. Flickinger, the duly appointed, qualified and acting administratrix of the above entitled estate, and who is also the surviving wife of the said Fredrick F. Flickinger, deceased, the said petition being for an Order to award to and set over to her, as the surviving spouse of the said Fredrick F. Flickinger, deceased, all of the property belonging to the estate of the said Fredrick F. Flickinger, deceased, and it appearing to the Court, and the Court finding that due notice of the time and place of the said hearing has been given for the time and in the manner provided by laws of the State of Washington, and by the Order of this Court, and the said petitioner, Hyacinth M. Flickinger, being present in Court, and represented by her attorney, O. O. McLane, and Martha Marie Flickinger, the minor daughter of the said Fredrick F. Flickinger, deceased, and the said Hya-

cinth M. Flickinger, the surviving sponse of the said Fredrick F. Flickinger, deceased, being represented by her Guardian Ad-Litem, Andrew J. Burkhart, and it further appearing to the Court, and the Court finding, that the estate of the said Fredrick F. Flickinger, deceased, consisted solely of the household furniture and furnishings and the home of the said Fredrick F. Flickinger, deceased, and the said petitioner, and it further appearing to the Court that no Homestead has been claimed in the manner provided by law, either prior or subsequent, to the death of the said Fredrick F. Flickinger, deceased, whose estate is being administered in these proceedings, and it also appearing to the Court that the entire estate, including household furniture and furnishings, and the interest of the said estate in the said real property, was the community property of the said Fredrick F. Flickinger, deceased, and Hyacinth M. Flickinger, the petitioner herein, and the entire estate, after the payment of the expenses of last illness of the said deceased, the funeral expenses and the cost of administration, is of the value of less than \$6,000.00, to wit: of the value of \$5807.42, and it also appearing to the satisfaction of the Court, from the filing of receipts herein, that the expenses of last illness and funeral expenses have been paid, and that the cost of administration has been provided for; that the property has been fairly and properly appraised, and that the said estate is not subject to any inheritance tax, either Federal or State.

It Is Therefore Ordered, Adjudged, and Decreed that the entire estate of the said Frederick F. Flickinger, deceased, be and the same is hereby awarded to and set over to Hyacinth M. Flickinger, the surviving wife of the said Frederick F. Flickinger, deceased, free and clear of all claims which have or could be filed against the said estate, and also free and clear of any and all heirs, vesting in her, the said Hyacinth M. Flickinger, absolute title to all property belonging to the said estate, and which is hereinafter described; that no further administration of the said estate be had; that the said estate be closed and the said administratrix be and she is hereby relieved from further liability in the said estate.

That the personal property, which is hereby awarded to and set over to the said Hyacinth M. Flickinger, is as follows: the household furniture and furnishings.

That the real property which is hereby awarded to and set over to the said Hyacinth M. Flickinger, constitutes the home and is located in Pierce County, in the State of Washington, known as No. 10428 Meadow Road, S. W., Tacoma 99, Washington, and is particularly described as follows:

That part of Lots 10 and 11 in Block 1 and that part of Spring Street as vacated by Order of Pierce County Commissioners recorded under Auditor's Fee No. 1505762 in Primley's Replat of a Portion of Lake Steilacoom Park, as per map thereof recorded in Book 11 of Plats, at page 42, records of Pierce County Auditor, lying southerly of a line

described as follows: Commencing at the Northeast corner of Lot 10, in Block 1 of Primley's Replat of a portion of Lake Steilacoom Park: (the North Line of said Lot 10 being an East and West line) Thence South $61^{\circ}09'$ East 28.3 feet to the true point of beginning for said described line; Thence South $64^{\circ}51'$ West 87 feet; Thence North $68^{\circ}09'$ west 47 feet; Thence South $79^{\circ}26'$ West 128 feet more or less to the Westerly boundary of said Block 1.

Done in Open Court this 26th day of March, 1957.

W. A. RICHMOND,
Judge.

Presented by:

O. O. McLANE,
Attorney for said estate.

Filed in Co. Clerk's Office. Pierce Co., Wash.
Mar. 26, 1957. Robt. L. Dykeman, Clerk. By MS,
Dep. RL 107-2-288.

State of Washington,
County of Pierce—ss.

I, Robt. L. Dykeman, County Clerk of Pierce County, and ex-officio Clerk of the Superior Court of the State of Washington, for the County of Pierce, do hereby certify that I have compared the foregoing copy with the original Instrument as the same appears on file and of record in my office, and that the same is a true and perfect transcript of said original and of the whole thereof.

In Testimany Whereof, I have hereunto set my hand and affixed the Seal of said Superior Court at my office at Tacoma this 9th day of October, 1957.

[Seal] ROBT. L. DYKEMAN,
 Clerk,
 /s/ By (Illegible),
 Deputy Clerk.

[Endorsed]: Filed October 31, 1957.

United States Court of Appeals
for the Ninth Circuit

No.....

In the Matter of
HYACINTH M. FLICKINGER, Bankrupt.

AGREED STATEMENT OF FACTS

Inasmuch as no oral testimony has been taken in these proceedings throughout, and practically all of the facts are documentary in nature, and since an agreed statement of facts on appeals appears to be favored;

Therefore, pursuant to provisions of Rule 76 of Rules of Civil Procedure, following is a statement of the facts essential to a decision of the questions involved by the Appellate Court, including a copy of each of the orders of the Honorable Judge of the District Court, and a copy of the Notice of Appeal showing its filing date, and copies of such

other papers as are deemed of possible use to the Appellate Court.

Following the death of Fredrick F. Flickinger on November 5th, 1956, leaving surviving, his wife, Hyacinth Flickinger, and minor daughter, Martha Marie Flickinger, open probate of his estate was instituted in the Superior Court of the State of Washington for Pierce County on December 4th, 1956. Notice to Creditors was given by publication on December 7th, 14th and 21st. An Inventory and Appraisement was filed January 3rd, 1957, showing an estate of \$11,500.00, subject to a mortgage balance on home of \$5315.54; funeral expenses of \$427.58; expenses of last illness \$100.00, and expenses of administration of \$250.00, leaving a net estate of \$5807.42.

On March 26, 1957 by an order of the Probate Court, duly given, and made and entered therein, the entire assets of the estate including the home were set over and awarded to the surviving spouse, a copy of which order is hereto attached.

On May 14, 1957, the widow of deceased, Hyacinth M. Flickinger, filed a petition in Bankruptcy, No. 17405. The next day she was adjudicated a bankrupt.

On May 29, 1957, the first meeting of creditors was held; no creditors appeared; the Referee decreed orally the "exemptions to be allowed"; "no Trustee to be appointed," but no formal order appears to have been entered.

On June 4th, 1957 a Trustee was appointed who

qualified; on July 3rd, 1957, an appraiser was appointed by the Trustee; the appraiser made an informal report.

All claims listed or filed in the Bankruptcy Proceedings were pre-existing claims with no mechanics or other liens, as all claims were prior to the death of Fredrick F. Flickinger, deceased, and the claims of Scott, Langhorne & McGavick & Donald H. McGavick was actually served in the probate Proceedings in the state court and then again served and filed in the Bankruptcy Proceedings.

No additional property was acquired, by the bankrupt between the time of the probate proceedings in the state court which was concluded on March 26, 1957 and the Filing of Bankruptcy on May 14, 1957.

On August 19th, 1957, the Trustee filed a report of exempt property, a copy of which is hereto attached.

Based upon the appraiser's report the Trustee petitioned the Referee for authority to sell the identical property described in the order of the state court of March 26, 1957 at private sale "free and clear of all valid liens and encumbrances" and "all liens and encumbrances if any to attach to the net proceeds of such sale."

On August 26th, 1957, the bankrupt filed certain motions and objections, including a copy of the set aside order of the homestead as a probate exemption. Following a hearing upon such motions and objections the Referee made an order "authorizing

the sale of real property at private sale" of the identically described property in the order of the state court of March 26, 1957.

On September 9th, 1957, an order authorizing such sale was made and filed herein, a copy of which is hereto annexed.

On October 3rd, 1957 the bankrupt filed a petition for review, and by a timely application the Referee made an order extending the time for filing her statement of facts pursuant to Rule 6 (B) of the Local Bankruptcy Rules, for ten days, and such statement of facts were duly filed.

For the purpose of review the Referee filed a Certificate of on-review showing summary of the case, the question presented, his conclusion and the paper transmitted for review.

The Trustee submitted his statement of facts, and the bankrupt also submitted a statement of facts and points involved.

Upon notice the matter was argued before the District Judge, the Hon. George H. Boldt, presiding, and order which was erroneously dated February 13, 1957, but later corrected to read December 13, 1957, was entered.

On December 23, 1957 counsel for the bankrupt made a motion for reconsideration of the decision and submitted supplement to "Brief of Bankruptcy," and also a "Brief of Bankruptcy," and Judge Boldt denied the motion, filing an order January 4, 1958.

Thereupon, the bankrupt filed "Notice of Appeal" on January 24, 1958; and on the same date

(January 24, 1958) paid into the Registry of the Court, cash of \$250.00 as and for an Appeal Bond and filed the regular Appeal Bond on January 27, 1958.

By Judge Boldt's orders, both original and subsequent, the action of the Referee was affirmed to the effect that the bankrupt's exempt property was ordered sold notwithstanding the set aside of the Superior Court in probate, and notwithstanding the bankrupt's Declaration of Homestead filed prior to the petition in bankruptcy, a copy of which is attached to the petition in bankruptcy.

/s/ O. O. McLANE,

/s/ J. PETER P. HEALY,

Attorneys for Bankrupt and
Appellant.

/s/ DONALD H. McGAVICK,

Trustee and Attorney for
Respondent.

United States District Court, Western District
of Washington, Southern Division

In Bankruptcy—No. 17405

In the Matter of

HYACINTH FLICKINGER,

Bankrupt.

ORDER

The question presented to this court on review of proceedings had before the referee in bankruptcy

is the propriety of an order of the referee dated September 25, 1957 authorizing sale of certain real property in which the bankrupt claims a homestead exemption.

Hyacinth Flickinger was adjudicated a bankrupt on May 15, 1957 pursuant to a voluntary petition filed by her May 14, 1957. Prior thereto, on March 26, 1957, the Honorable W. A. Richmond, Judge of the Superior Court of the State of Washington for Pierce County, in probate cause No. 62579 had awarded the subject real property to the bankrupt in lieu of homestead in connection with the probate of her husband's estate. Shortly thereafter and prior to the proceedings now on review, the bankrupt declared a homestead in the subject property in accordance with Chapter 6.12 of the Revised Code of Washington. At the first meeting of creditors in the bankruptcy proceedings the bankrupt testified that her equity in the property was of the value of \$4,800. Thereafter at the request of a creditor alleging that the bankrupt's equity in such property was in fact of a value substantially in excess of the \$6,000 homestead exemption established by Washington law, a trustee was appointed on June 4, 1957. On August 18, 1957 an appraisal of the property by a court appointed appraiser revealed that the market value of the subject real property as of that date was substantially in excess of bankrupt's \$6,000 exemption and all liens and encumbrances. Following a hearing held before the referee on September 12, 1957, at which time it was

agreed by all parties that the property is indivisible, the referee authorized sale by the trustee of the entire property saving to the bankrupt her right to an award of \$6,000 cash in lieu of her homestead exemption. This review follows.

The Bankruptcy Act, Sec. 70(a) (11 U.S.C.A. 110(a)) vests the trustee in bankruptcy as of the date of filing of the petition with title to all property of the bankrupt except that which is held to be exempt. Sec. 70(c) (11 U.S.C.A. 110(c)) gives the trustee all the rights, remedies and powers of a creditor (whether or not such creditor actually exists) as to all property upon which such hypothetical creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of adjudication of bankruptcy. The law of the State of Washington limits the value of the homestead exemption to \$6,000. R.C.W. 12.050. Provision is made in R.C.W. 6.12.140 et seq. for proceedings in the state courts by a judgment creditor to contest the value of a homestead and obtain execution for enforcement of a judgment against the proceeds from sale of that portion of the debtor's property which is in excess of the \$6,000 limit. R.C.W. 6.12.230 requires the sale of the entire property if it appears from the report of appraisers that the land claimed as a homestead by the debtor exceeds in value the amount of homestead exemption and that it is indivisible. R.C.W. 6.12.260 gives the debtor the same protection against legal process with respect to the money received from

the proceeds of such sale as she would have had in the homestead property itself.

From the foregoing it is clear that under Washington law a creditor of the bankrupt could have obtained a lien in the subject property by legal or equitable proceedings at the time of adjudication of bankruptcy. Under the rule recently laid down in this circuit in *England v. Sanderson*, 236 F.2d 641 (9 Cir. 1956) in such a situation a general creditor of the bankrupt need not seek his relief in the state courts but may proceed in the bankruptcy court because title to all of the bankrupt's real property which is in excess of the \$6,000 homestead exemption is vested in the trustee in bankruptcy by operation of law as of the date of adjudication of bankruptcy. 11 U.S.C.A. 110(a) and (c). The cases to the contrary cited by counsel for the bankrupt are all clearly distinguishable under the reasoning of the Court of Appeals for the Ninth Circuit in the *England* case, *supra*.

The contention raised by counsel for the bankrupt that the order of the Superior Court for the State of Washington for Pierce County in probate cause No. 62579 fixing the value of the property here in question as of March 26, 1957 at \$5,807.42 is *res judicata* as to the value of such property at the later date of bankruptcy adjudication obviously is without merit.

The order of the referee dated September 28, 1957 authorizing the sale of the real property of the bankrupt on the terms and conditions therein stated

is proper in every respect and must be affirmed.
It Is So Ordered.

Dated this 13th day of February, 1957.

GEO. H. BOLDT,
U. S. District Judge.

[Title of District Court and Cause.]

MOTION FOR RECONSIDERATION
OF DECISION

Comes now Hyacinth M. Flickinger, the above named bankrupt, by and through her attorneys, J. Peter P. Healy and O. O. McLane, and respectfully moves this honorable Court to reconsider its recent Order in the above entitled cause, which Order is erroneously dated the 13th day of February, 1957, but apparently was intended for the 13th day of December, 1957.

This Motion is based upon the records and files herein and upon the Briefs hereto attached, each of said two Briefs having been prepared separately and individually by the two different attorneys and which the greater part thereof, covers different points.

J. PETER P. HEALY,
O. O. McLANE,
Attorneys for Hyacinth M.
Flickinger, Bankrupt.

[Title of District Court and Cause.]

ORDER

Motion by the bankrupt for reconsideration of the order of this court filed December 16, 1957 has been fully considered in the light of the briefs filed in support thereof. Nothing appearing either in the motion or the briefs requires modification or reversal of the order above referred to. Moreover, that decision was reached without regard to possible questions of fraud or inadequacy of notice in the state court proceedings under the ruling of the Supreme Court of the United States in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 either of which might well be urged as additional grounds for adhering to this court's previous ruling. Accordingly, it is hereby

Ordered that the motion for reconsideration be and the same hereby is denied.

It Is Further Ordered that, pursuant to Rule 60(a) F.R.Civ.P., the clerical error appearing on page 3, line 24 of the order of this court previously filed herein December 16, 1957 is hereby corrected by deleting said line and substituting therefor the following: "Dated this 13th day of December, 1957." Interlineation to such effect has been made and initialed by the court.

Dated this 2nd day of January, 1958.

GEO. H. BOLDT,
U. S. District Judge.

In the District Court of the United States, Western
District of Washington, Southern Division

In Bankruptcy—No. 17405

In the Matter of

HYACINTH FLICKINGER, Bankrupt.

NOTICE OF APPEAL

Comes now the bankrupt, Hyacinth Flickinger, by and through her attorneys of record, O. O. McLane and J. Peter P. Healy, and appeal to the Ninth Court of Appeals of the United States from the Order of the United States District Court for the Western District of Washington, Southern Division, in this cause, and the Honorable George H. Boldt, Judge thereof presiding, filed in said District Court on December 16th, 1957, affirming the order of the Referee in Bankruptcy of September 28th, 1957, authorizing and directing the sale of the bankrupt's homestead, regularly claimed under the State Statute prior to bankruptcy, and also duly awarded to her the said bankrupt by an order of the State Probate Court in lieu of homestead under the provisions of the State Law, valued at over \$5800.00, all prior to the bankruptcy proceedings.

This appeal is based upon and also runs from the order of the said District Court and the said Judge Boldt, dated January 2nd, 1958, and filed in the office of the Clerk on January 2nd, 1958, deny-

ing the bankrupt's motion for reconsideration of the court's order filed December 16th, 1957, as aforesaid, and giving additional grounds therein, and correcting error in the original order.

Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131; 57 S. Ct. 382; 81 L. ed 557.

Dated this 24th day of January, 1958.

O. O. McLANE,
J. PETER P. HEALY,
Attorneys for Bankrupt, Hyacinth M. Flickinger.

MEMORANDUM OF LEGAL PUBLICATION

O. O. McLane, Attorney
918 Puget Sound Bank Bldg.

No. 62579—Notice to Creditors

In the Superior Court of the State of Washington in and for the County of Pierce.

In the Matter of the Estate of Fredrick F. Flickinger, Deceased.

Notice is hereby given that the undersigned has been appointed and has qualified as administratrix of the estate of Fredrick F. Flickinger, Deceased; that all persons having claims against said deceased are hereby required to serve the same, duly verified, on said administratrix or her attorney of record at the address below stated, and file the same with the Clerk of said Court, together with proof of such service, within six months after the date of

first publication of this notice or the same will be barred.

Date of first publication December 7, 1956.

HYACINTH M. FLICKINGER,
Administratrix of said Estate, 10428 Meadow Road,
Tacoma 99, Washington.

O. O. McLANE,
Attorney for Estate, 918-20 Puget Sound Bank
Bldg., Tacoma 2, Washington.

Dec. 7, 14, 21.

In the Superior Court of the State of Washington,
for the County of Pierce

No. 62579

In the Matter of the Estate of
FREDRICK F. FLICKINGER, Deceased.

INVENTORY AND APPRAISEMENT

State of Washington,
County of Pierce—ss.

Hyacinth M. Flickinger, administratrix of the above entitled estate being first duly sworn on her oath, says that the within is a true inventory of all the estate, real, personal and mixed, of said decedent coming into her hands.

Subscribed and sworn to before me this 4th day of December, 1956.

O. O. McLANE,
Notary Public in and for the State of Washington,
residing at Tacoma, Washington.

State of Washington,
County of Pierce—ss.

Lydia Quinn, appointed by Inheritance Tax Department D. A. Canale and George Christensen, duly appointed appraisers of the above entitled estate, being duly sworn, each for himself says:

I will honestly and impartially appraise the property of said estate, which shall be exhibited to me, according to the best of my knowledge and ability.

LYDIA QUINN,
D. A. CANALE,
GEORGE CHRISTENSEN.

Subscribed and sworn to before me this 3rd day of January, 1957.

O. O. McLANE,
Notary Public in and for the State of Washington,
residing at Tacoma, Washington.

Inventory of Property of Said Estate: Household furniture & furnishings,

Appraised Values: Personal Property: \$400.00.

Inventory of Property of Said Estate: Land, Assessed Valuation: Real Estate \$275.00. Improvements: \$2155.00. Appraised Values: Real Property \$11,500.00, Mortgage \$5315.00, Net \$6185.00.

The home described as: That part of Lots 10 and 11 in Block 1 and that part of Spring Street as vacated by Order of Pierce County Commissioners recorded under Auditor's Fee No. 1505762 in Primley's Replat of a portion of Lake Steilacoom Park, as per map thereof recorded in Book 11 of Plats,

at page 42, records of Pierce County Auditor, lying Southerly of a line described as follows: Commencing at the Northeast corner of Lot 10, in Block 1 of Primley's Replat of a Portion of Lake Steilacoom Park: (The North line of said Lot 10 being on East and West line) thence South $61^{\circ}09'$ East 28.3 feet to the true point of beginning for said described line; thence South $64^{\circ}51'$ West 87 feet; thence North $68^{\circ}09'$ West 47 feet; thence South $79^{\circ}26'$ West 128 feet more or less to the Westerly boundary of said Block 1. Subject to mortgage in favor of Olympia Federal Savings and Loan Association, upon which there was unpaid on November 5, 1956, \$5315.54.

Total Assessed Valuation of Real Estate, \$275.00.

Total Assessed Valuation of Improvements, \$2155.00.

Total Appraised Valuation of Personal Estate, \$400.00.

Total Appraised Valuation of Real Estate, \$6185.00.

Total Appraised Valuation of Estate, \$6585.00.

Community Interest, \$3,292.50.

We, the undersigned appraisers, do hereby certify that we have appraised the property described in the above inventory at \$6585.00, the fair value thereof.

Dated this 3rd day of January, 1957.

LYDIA QUINN,
D. A. CANALE,
GEORGE CHRISTENSEN.

In the District Court of the United States, Western
District of Washington, Southern Division

No. 17405

In the Matter of

HYACINTH M. FLICKINGER, Bankrupt.

NOTICE

Attached hereto is the legal description of the real property contained in the above-named bankrupt's estate, which is subject to the Trustee's administration. The Trustee does not warrant or guarantee the condition of the home situated thereon, and in lieu thereof, opportunity is offered for an inspection prior to sale. The sale will be made "as is" and "where is." All bidders are urged to avail themselves of the opportunity to inspect the property and become acquainted with the precise identity and condition thereof. No rebate or adjustment can be made after bid is accepted.

DONALD H. McGAVICK,
Trustee of above Bankrupt.

Real property located at No. 10428 Meadow Road, SW, Tacoma 9, Washington, more particularly described as follows:

That part of Lots 10 and 11 in Block 1 and that part of Spring Street as vacated by order of Pierce County Commissioners recorded under Auditor's Fee No. 1505762 in Primley's Replat of a portion of Lake Steilacoom Park, as per map thereof recorded in Book 11 of Plats, at page 42, records of

Pierce County Auditor, lying southerly of a line described as follows: Commencing at the Northeast corner of Lot 10 in Block 1 of Primley's Replat of a portion of Lake Steilacoom Park: (The North line of said Lot 10 being an East and West line); Thence South $61^{\circ}09'$ East 28.3 feet to the true point of beginning for said described line; thence South $64^{\circ}51'$ West 87 feet; thence North $68^{\circ}09'$ West 47 feet; thence South $79^{\circ} 26'$ West 128 feet more or less to the Westerly boundary of said Block 1,

together with the home improvements situated thereon.

The above property has been appraised at the value of \$15,000, subject to a mortgage of \$5,200 and a declaration of homestead of \$4,800, for a net of \$5,000.

GEORGE L. MARK,
George L. Mark,
Appraiser.

[Title of District Court and Cause.]

TRUSTEE'S REPORT OF EXEMPT PROPERTY

To....., Referee in Bankruptcy.

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid as his own property, under the provisions of the Act of Congress relating to bankruptcy, as his exemptions allowed by law and claimed by him

in his schedules filed in the above entitled proceeding.

General Head: * * * Revised Code of Washington 6.12.010 et seq. Particular Description: Real Property situated in Pierce County, State of Washington, to wit: (See description attached). Declaration of homestead filed in Pierce County Auditor's Office, under fee #1787113. Estimated Value: \$4800.00

General Head: Revised Code of Washington 6.16.010 et seq. Particular Description and Estimated Value: Cash on Hand \$3.50. Household furniture and furnishings \$400.00. Wearing apparel \$100.00. 1950 Chevrolet Automobile \$80.00.

Dated this 19th day of August, 1957.

DONALD H. McGAVICK,
Trustee.

Filed August 18, 1957.

[Title of District Court and Cause.]

PETITION OF REVIEW

To the Honorable George H. Boldt, Judge of the United States District Court, Western District of Washington, Southern Division:—

Comes now Hyacinth Flickinger, by and with the assistance of her attorneys, O. O. McLane and J. Peter P. Healy, and petitions this Honorable Court for a review of the proceedings, and particularly in order of the Honorable O. M. Pitzen, Referee in Bankruptcy within this District of Ta-

coma, in which the said Referee entered an order on or about the 24th day of September, 1957, authorizing the Trustee in Bankruptcy herein to sell certain real property alleged to belong to the bankrupt estate, copy of which order is hereto attached, marked Exhibit "A", and hereby referred to and by this reference hereby made a part of this petition.

The jurisdiction of this court is invoked under the provisions of the United States Bankruptcy Law, pursuant to Chapter 11, U. S. C. A.

This petition shows that the bankrupt is a widow since November 5th, 1956, the estate of her late husband, Fredrick M. Flickinger, being probated in the State of Washington for Pierce County, in Cause No. 62579.

In said probate proceedings the home of the bankrupt was appraised by three disinterested appraisers appointed by the probate court at the sum of \$6,185.00, over and above mortgage encumbrances thereon, with an unpaid balance at that time of \$5,315.00. Later on and on or about the 14th day of May, 1957, she filed her homestead declaration on all of the property described in Exhibit "A" hereto attached; a copy of said homestead declaration is attached to the petition and schedules in bankruptcy.

That on the 29th day of May, 1957, the first meeting of creditors was held, and the Referee then and there decided and declared orally that the exemptions would be allowed, and no Trustee would be appointed.

That on the 19th day of August, 1957, the Trustee made a report of exempt property, “* * * and set apart to be retained by the bankrupt aforesaid as his own property * * *”, and included the home property described in the declaration of homestead and personal property.

That theretofore at the suggestion of one or two general creditors without liens, a Trustee was appointed and qualified; the Trustee applied for and obtained from the Referee the appointment of one appraiser, who is reported to have viewed the property from the outside and reported that he could sell it for \$15,000.00. The same property had been appraised in probate on the 3rd day of May, 1957, by three appraisers appointed by the Superior Court in Probate at \$11,500.00, of which \$5350.00 represented the unpaid balance on mortgage liens, and after the expenses of funeral and the probate expenses were deducted, the balance was set aside to the widow, the bankrupt herein, and the probate homesteaded and declared exempt from the claims of all creditors of said deceased, all of which happened and occurred prior to the filing of the petition and schedules in bankruptcy herein.

That following the report of the single appraiser in the bankruptcy proceedings, to and through the Trustee for the referee, the latter made the order, Exhibit “A”, over the objections of the bankrupt through her counsel on the grounds of the exemptions claimed by the bankrupt by declaration, and allowed by the Superior Court in probate, all prior to the proceedings in bankruptcy; that said objec-

tions were heard upon notice before the Referee and overruled, and by the order, Exhibit "A", of the Referee the proceeds of the sale were ordered deposited in the bank "for the benefit of the creditors."

The bankrupt with the assistance and advice of her counsel herein, believes that the order of sale is erroneous; that the exemptions of the bankrupt should have been allowed, and the trustee should have set apart to the bankrupt her home as exempt as is required of him by the bankruptcy law, even though under proceedings in the State court or courts the property might have been, though not certainly, subjected to sale and to the provisions of Chapter 6.12 of the Revised Code of Washington, by lien creditors holding liens prior to the initiation of the bankruptcy proceedings herein.

That, by virtue of the State law the validity of a homestead exemption must be contested in a court of general jurisdiction: RCW 6.12.090. Petitioner is advised and believes, and therefore alleges, that where the State court has decreed a homestead exemption in proper proceedings such as probate, prior to the bankruptcy court taking jurisdiction, that the homestead exemption is a matter of res judicata, and may not be upset by orders of the bankruptcy court.

Wherefore, the bankrupt prays that this Honorable Court will review the proceedings had, taken and made before the Referee, and upon the completion of the review to order the exemptions of the bankrupt allowed, and the property set over to her

as exempt so far as the bankruptcy proceedings are concerned; and for her costs in this proceedings, and for such other and further relief as may be proper in the premises.

HYACINTH FLICKINGER,
Petitioner.

Duly Verified.

[Title of District Court and Cause.]

ORDER AUTHORIZING SALE OF REAL
PROPERTY AT PRIVATE SALE

This matter having come on for hearing the 12th day of September, 1957, upon the petition of the Trustee of the above named bankrupt's estate to sell the real property of said estate at private sale; the Trustee, Donald H. McGavick, appearing in person, and the said bankrupt appearing by and through her attorneys, O. O. McLane and J. Peter P. Healy; the court having examined the records and files herein and having heard oral argument of the attorneys for the said bankrupt; and being fully advised in the premises:

Now Therefore, the Court advises and determines that it is in the best interests of the bankrupt estate that the real property be sold at private sale for the benefit of the creditors, and the said bankrupt is hereby instructed to cooperate fully with the Trustee in facilitating the sale, and if she fails so to do she shall face possible removal from the premises:

It Is Ordered, Adjudged and Decreed, That the Trustee be and he hereby is authorized to sell the real property of the bankrupt's estate, situate in the County of Pierce, State of Washington, and more particularly described as follows, to wit:

Real property located at No. 10428 Meadow Road, S. W., Tacoma 99, Washington, to wit:

That part of Lots 10 and 11 in Block 1 and that part of Spring Street as vacated by order of Pierce County Commissioners recorded under Auditor's Fee No. 1505762 in Primley's Replat of a portion of Lake Steilacoom Park, as per map thereof recorded in Book 11 of Plats, at Page 42, records of Pierce County Auditor, lying southerly of a line described as follows: Commencing at the Northeast corner of Lot 10 in Block 1 of Primley's Replat of a portion of Lake Steilacoom Park: (The North line of said Lot 10 being an East and West Line); thence South $61^{\circ}09'$ East 28.3 feet to the true point of beginning for said described line; thence South $64^{\circ}51'$ West 87 feet; thence North $68^{\circ}09'$ West 47 feet; thence South $79^{\circ}26'$ West 128 feet more or less to the Westerly boundary of said Block 1;

together with the home improvement situated thereon, at private sale after notifying as many interested parties as is reasonably possible so to do; that the property shall pass free and clear of all valid liens and incumbrances, and all such liens and incumbrances, if any, shall attach to the net proceeds of such sale, and that the proceeds realized from the said sale shall be deposited in the Trus-

tee's account at the National Bank of Washington, Tacoma, Washington, for the benefit of creditors.

Done in Open Court, this 24th day of September, 1957.

O. M. PITZEN,

Referee in Bankruptcy.

Presented by:

DONALD H. McGAVICK.

Acknowledgment of Service Attached.

DECLARATION OF HOMESTEAD

Know All Men By These Presents: That I, Hyacinth M. Flickinger, do hereby declare the property hereinafter described as a "Homestead", and in support of such declaration state as follows:

I.

That I am a widow but am the head of a family consisting of myself, Hyacinth M. Flickinger, and my minor daughter, Martha Marie Flickinger, who is now fifteen (15) years of age and is supported and provided for by myself.

II.

That I, with my said minor daughter, Martha Marie Flickinger, reside on the premises hereinafter described and intend to continue to reside thereon, and do hereby claim the same as a "Homestead."

III.

That the said premises are situated in Pierce County, in the State of Washington, in the district

known as Lakewood Center, and is known as No. 10428 Meadow Road, S.W., Tacoma 99, Washington, and are particularly described as follows:

That part of Lots 10 and 11 in Block 1 and that part of Spring Street as vacated by Order of Pierce County Commissioners recorded under Auditor's Fee No. 1505762 in Primley's Replat of a Portion of Lake Steilacoom Park, as per map thereof recorded in Book 11 of Plats, at page 42, records of Pierce County Auditor, lying southerly of a line described as follows: Commencing at the Northeast corner of Lot 10, in Block 1 of Primley's Replat of a portion of Lake Steilacoom Park: (The North Line of said Lot 10 being an East and West line); Thence South $61^{\circ}09'$ East 29.3 feet to the true point of beginning for said described line; Thence South $64^{\circ}51'$ West 87 feet; Thence North $68^{\circ}09'$ West 47 feet; Thence South $79^{\circ}26'$ West 128 feet more or less to the Westerly boundary of said Block 1.

IV.

That the said premises hereinabove described are my separate property.

That the said premises are of the actual cash value of not to exceed \$10,000.00. That the said premises are subject to a certain real estate mortgage in favor of The Olympia Federal Savings and Loan Association, of Olympia, Washington, upon which mortgage there is unpaid the sum of \$5,200.00, so that the interest in and to the said

property of the said Hyacinth M. Flickinger is in the sum of \$4800.00.

Dated at Tacoma, Washington, this 7th day of May, 1957.

HYACINTH M. FLICKINGER,
Testatrix.

State of Washington,
County of Pierce—ss.

I, O. O. McLane, a Notary Public in and for the said State, do hereby certify that on this 7th day of May, 1957, personally appeared before me Hyacinth M. Flickinger, to me known to be the individual described in and who executed the above and foregoing "Declaration of Homestead", and acknowledged that she signed and sealed the same as her free and voluntary act and deed for the uses and purposes therein mentioned, and on oath stated that the facts therein set forth are true and correct.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] O. O. McLANE,

Notary Public in and for the State of Washington,
residing therein at Tacoma, Washington.

Filed for Record May 14, 1957, 10:41 a.m.
Request of Jack W. Sonntag, Pierce Co. Auditor.

[Endorsed]: No. 15921. United States Court of Appeals for the Ninth Circuit. Hyacinth Flickinger, Appellant, vs. Donald McGavick, Trustee in Bankruptcy of the Estate of Hyacinth Flickinger, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed: March 4, 1958.

Docketed: March 8, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15921

In the Matter of

HYACINTH M. FLICKINGER, Bankrupt.

STATEMENT OF POINTS

Pursuant to Subdivision 6, of Rule 17, of the Rules of the above Court, the appellant submits, respectfully, the following Statement of Points, alleged to be errors of law committed by the District Court herein, upon which she intends to rely, upon this appeal; and a designation of the Record, deemed material to the consideration of the appeal, to wit:

First

Homestead exemptions are governed by the provisions of State law, to wit: Statutes, and Decisions of the Highest Court of the State of Bankrupt's domicil, relating thereto. The Bankruptcy Act contains no provision for the claim of Homestead Exemption. The State law creates the exemption and governs its nature, value, and extent; and in this case, contains the only provision for contesting the same. The District Court based its original decision of December 13, 1957, upon the following:

The Bankruptcy Act, Sec. 70 (c) (11 USCA 110 6).

England vs. Sanderson, 236 Fed. 2d 641 (9th Circuit).

Second

It is the policy of the law to apply liberal construction to claims of Homestead Exemption. That policy is not discernible in the holding of the District Court.

Third

An award by the probate court of an homestead to a surviving spouse, regularly made, prior to filing of a petition in bankruptcy, in res judicata in the subsequent bankruptcy proceedings. The District Court ignored this rule.

Fourth

Our Rule 41, effective January 3, 1955, still obtaining, of Pleading, Practice and Procedure, requires notice to known heirs and distributees, of the pendency of probate proceedings, within twenty days of appointment of Executor or administrator.

Respondent herein had notice and filed creditor's claim in both probate, and in Bankruptcy proceedings.

Fifth

This bankrupt filed her Declaration of Homestead pursuant to RCW 6.12.060, prior to any proceedings in Bankruptcy. That exemption is presumed to be valid to the extent of all lands claimed exempt, until contested in a court of general jurisdiction, in the county where situated. RCW 6.12.090.

No contest was filed in any Court.

Sixth

The Superior Court of the State of Washington for Pierce County, wherein this homestead is situated, is a court of general jurisdiction.

All Federal Courts, including Bankruptcy, are Courts of special or limited jurisdiction.

An homestead contest of its validity can take place only in the State Court, and not in any Federal Court.

Seventh

At the first meeting of creditors in Bankruptcy, on May 29, 1957, the Referee orally announced that "exemptions to be allowed", and "no trustee to be appointed."

On August 19, 1957, the Trustee (later appointed and qualified) filed a Report of Exempt Property. (See Record.) It contained this language: "The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid as

his own property, under the provisions of the Act of Congress relating to Bankruptcy, as his exemptions allowed by law and claimed by him in his schedules filed in the above entitled proceeding.” (Description attached.)

Is not the Bankruptcy Court bound by this record?

Eighth

In view of the facts in divisions Third, Fourth, Fifth, Sixth, and Seventh, above, the District Court’s reference to the case of

Mullane vs. Central Hanover Bank & Trust Co., 239 U. S. 306, 70 S. St. 652, referred to in his decision of January 2, 1958, has no pertinent effect upon the final decision in this case.

Ninth

Is an Order of the Superior Court made and entered after proper notice, in State Court Probate Proceedings six weeks prior to Bankruptcy, declaring the home of the Bankrupt exempt from all claims filed or which could have been filed, in said Probate Proceedings, binding in Bankruptcy, where claims were unliquidated, unsecured and no lien existed, where all claims filed or listed in Bankruptcy Proceedings were ante-dated and were pre-existing as to the said Probate Proceedings.

Appellant Bankrupt says “Yes”. District Court says “No”.

Tenth

Is a “Declaration of Homestead” filed prior to Bankruptcy, conclusive in Bankruptcy where same was not contested as provided by State laws, RCW

Sec. 6.12.090 and RCW Sec. 6.12.140, and the only evidence as to the value was an ordinary letter signed by a real estate broker stating "He believed he could sell the homestead for \$15,000.00", but failed to state upon what terms, where there was a mortgage of \$5,400.00 and homesteader was entitled to exemption of \$6,000.00. RCW Sec. 6.12.050.

Neterer, J., in 6 Fed. Supp. 109 says "Yes". The District Court says "No".

Respectfully submitted,

O. O. McLANE,
J. PETER P. HEALY,
Attorneys for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 13, 1958. Paul P. O'Brien; Clerk.



In the
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

IN THE MATTER OF
HYACINTH M. FLICKINGER, Bankrupt,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLANT

O. O. McLANE,
J. PETER P. HEALY,
Attorneys for Appellant

918 Puget Sound Bank Bldg.
Tacoma, Washington



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In the
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

IN THE MATTER OF
HYACINTH M. FLICKINGER, Bankrupt,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLANT

Pursuant to the rules of the Court of Appeals Ninth Circuit, Appellant submits this her brief on appeal:

1. *POLICY OF THE LAW*: It is the policy of the law generally to favor and prefer homesteads for the protection of the family, the bulwark of American life, and provisions for homestead exemptions are entitled to liberal construction. *Van Slyke v. Bumgarner*, 177 W.326, 31 P.2d. 1014; in Re: *Dudley*, 72 F.S. 943 (Cal. 1947; Yankwich, J.), 120 F.S. 317; *First National Bank etc., v. Tiffany*, 40 W.2d. 193, 242 P.2d. 169.

2. *NO FEDERAL HOMESTEAD LAW*: There is no provision made by the Federal Statutes for homestead claims, so far as the subject of bankruptcy is concerned, but it is the custom, policy and practice, in bankruptcy proceedings, to concede, allow and order exemptions of homesteads properly claimed, in accordance with the State Statutes of the State wherein the bankrupt is domiciled; and to follow the provisions of the State Statutes and the interpretations of such Statutes as interpreted by the highest Courts of the States with relation to homestead exemptions. *Burns v. Kinzer*, 161 F.2d. 806 n. (Tenn. 1947); *Allen v. Tate*, 6 F.2d. 139 (Miss. 1925). 3 REM. on Bankruptcy, Sec. 1294.

3. *WASHINGTON HOMESTEAD STATUTES*: The State of Washington homestead exemption laws are comprised in RCW 6.12, from which, the following quotation is taken:

“Every homestead claimed in the manner provided by law, shall be presumed to be valid to the extent of all the lands claimed, until the validity thereof is contested in a Court of general jurisdiction, in the County or District in which the homestead is located.”

(RCW 6.12.090.)

In this case, throughout its whole history, the lands have been doubly claimed by the bankrupt, since prior to the institution of bankruptcy proceedings, by her application for an award in probate in lieu of homestead provisions of the law; and again by a formal declaration of homestead, pursuant to the Statute,

executed, acknowledged and filed of record before the institution of bankruptcy proceedings; and there has never been any contest of the validity of said homestead so claimed by the bankrupt in any Court of general jurisdiction.

4. *COURTS*: Federal Courts, including Bankruptcy Courts, are all Courts of special and limited jurisdiction and are not Courts of general jurisdiction.

“The Federal Courts are all Courts of special and limited jurisdiction * * *” 54 Am. Jur. 671, Sec. 10, and cases there cited, including *Chicot, etc., v. Baxter State Bank*, 308 U.S. 371, 60 S. Ct., 317, 84 L. Ed. 329. See also *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 61 S. Ct. 179.

It needs no citation of authorities that the Superior Court of the State of Washington is a Court of general jurisdiction, without limitation. Therefore, any contest of the validity of this bankrupt's doubly claimed homestead could be properly determined only in the Superior Court of the State of Washington for Pierce County, a Court of general jurisdiction; and not in any Federal Court whatever.

Moreover, since the trustee, in this instant case, set apart, as exempt, the homestead claimed by the bankrupt herein, and that order of the trustee filed in the bankruptcy proceedings has never been set aside nor modified, nor reversed in any way or manner, it would appear that the bankruptcy Court has no jurisdiction to entertain a contest on the validity of that homestead.

"A Court of bankruptcy is without jurisdiction to order the sale, for any purpose, of property which it has set apart to a bankrupt as his homestead exemption." In *Re: Yungbluth*, 220 F. 110. See also *In Re: Von Hee*, 238 F. 422 and *Van Slyke v. Bumgarner*, *supra*.

5. *CLAIMS — LIEN AND NON-LIEN*: In this instant case there are no lien claims shown, therefore, it would appear obvious that there could be no conflict between a lien claim and a non-lien claim. In such an event it does not appear that the principal basis of the trial judge's original decision so far as Sec. 70(c) (11 USCA 110(c)) is either necessary or applicable. Referring to the language of the trial judge's decision, dated February 13, 1957, but corrected to read December 13, 1957, he says:

"From the foregoing it is clear that under Washington law a creditor of the bankrupt could have obtained a lien on the subject property by legal or equitable proceedings at the time of adjudication of bankruptcy. Under the rule recently laid down in this circuit, in *England v. Sanderson*, 236 F.2d. 641 (9th Cir. 1956) * * *."

We submit that it is not "clear" that a creditor of the bankrupt *could* have obtained a lien against this property as of such date or any other dates subsequent to March 26, 1957, when the probate homestead was set aside to her, or not subsequent to the date when she filed her declaration of homestead prior to filing her petition in bankruptcy, WITHOUT first having contested the homestead declaration under the provisions of RCW 6.12. This homestead law, as we view

it and as it appears to be sustained by the decisions under it, absolutely precludes a creditor obtaining a lien upon the exempt property without first contesting the exemption *successfully*.

6. *BANKRUPTCY PROCEDURE*: Although it must be obvious that the affirmative provisions of the language of the Bankruptcy Act must control, it is the general rule that equitable principles prevail in bankruptcy where they are not in conflict with the provisions of the Bankruptcy Act, to the end that justice shall be done consistent with the Bankruptcy Law, rather than that strict and rigid rules of the law Court, distinguished from Courts of equity, shall prevail. 6 *Am. Jur.* 573-575, Sec. 35.

7. *RES JUDICATA*: While on the subject of this decision of the trial Court, he says in the next to last paragraph thereof:

"The contention raised by Counsel for the bankrupt that the order of the Superior Court for the State of Washington for Pierce County, in Probate Cause No. 62579, fixing the value of the property herein in question as of March 26, 1957, at \$5,807.42 is *res judicata* as to the value of such property at the later date of bankruptcy adjudication, obviously is without merit."

We are obliged to disagree with this statement for reasons of both fact and law. The trial Court's quoted statement shows the date of Probate set aside March 26, 1957, this record shows the bankruptcy was filed May 14, 1957, one month and eighteen days after

the set aside. Manifestly there could not have been any material change in the value in that short period of time. As a matter of law, neither the trial Court nor any other Court should be permitted to brush off the decision of Judge Neterer in *Naslund* 6F. Supp. 109, which is consistent with the holdings in re: *Rhodes*, 109 F.117; *In Re: Eash*, 157 F. 996; *Martin v. Oliver*, 260 F. 89. The facts in the Oliver case are almost identical with the facts in the instant case. See also 3 *REM. Bankruptcy*, Page 179, Sec. 1286; 2 F.2d. 164 aff'd in 4 F.2d. 285. We feel that this Naslund case is determinative of the instant case.

In the trial judge's decision of January 2, 1958, he places some reliance upon the case of *Mulane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, with respect to notice of judicial proceedings, but the creditor's claim, which gives rise to the issues in this case, was filed in Probate and again in bankruptcy; the filing in bankruptcy was pursuant to a notice to creditors duly given and done in the probate case. In as much as the Mulane case has to do with the sufficiency of legal notice in judicial proceedings, it must be manifest that the Mulane case has no bearing at all upon the facts of this case.

SUMMATION: In view of the above citations and their application to the different principles of law and the law of the Statutes cited, the effect of the trial Court's decision is to destroy the liberal construction, do away with the equitable nature, make the homestead claim disfavored in law, ignore the

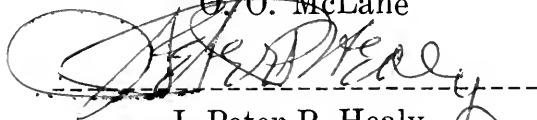
exclusive jurisdiction of the Superior Court in its general jurisdiction to entertain a contest of homestead claim, and absolutely upset the *res judicata* decree of the Probate Court, and wipe out the legal effect of the bankrupt's homestead declaration before bankruptcy, without contest, and to completely reverse the action of the trustee in allowing and setting aside the homestead to the bankrupt.

It must be admitted that Sec. 70(c) of the Bankruptcy Act, which has been on the books for many years, even though amended in 1950 and 1952, must have a terribly devastating effect to wreak so much havoc with the foregoing principles of law and the Statutes and Orders, and make the result so completely unimaginable, unconscionable and unprecedented; we cannot believe that it was ever intended by Congress that said Sec. 70(c) could be so used as to result in these effects.

Respectfully submitted,

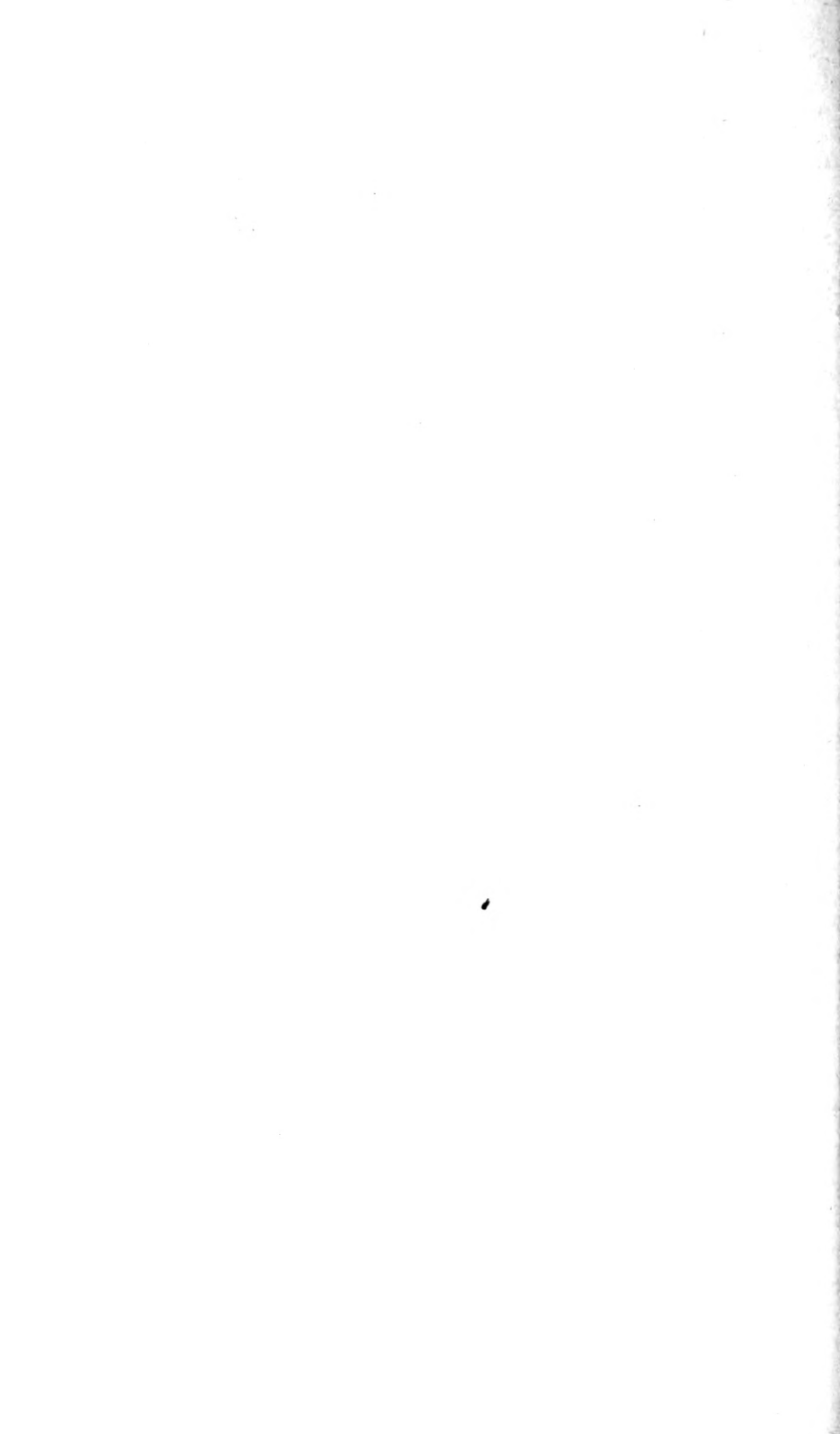


O. O. McLane



J. Peter P. Healy

Attorneys for Appellant.



No. 15921

United States
Court of Appeals
FOR THE NINTH CIRCUIT

HYACINTH FLICKINGER,

Appellant,

VS.

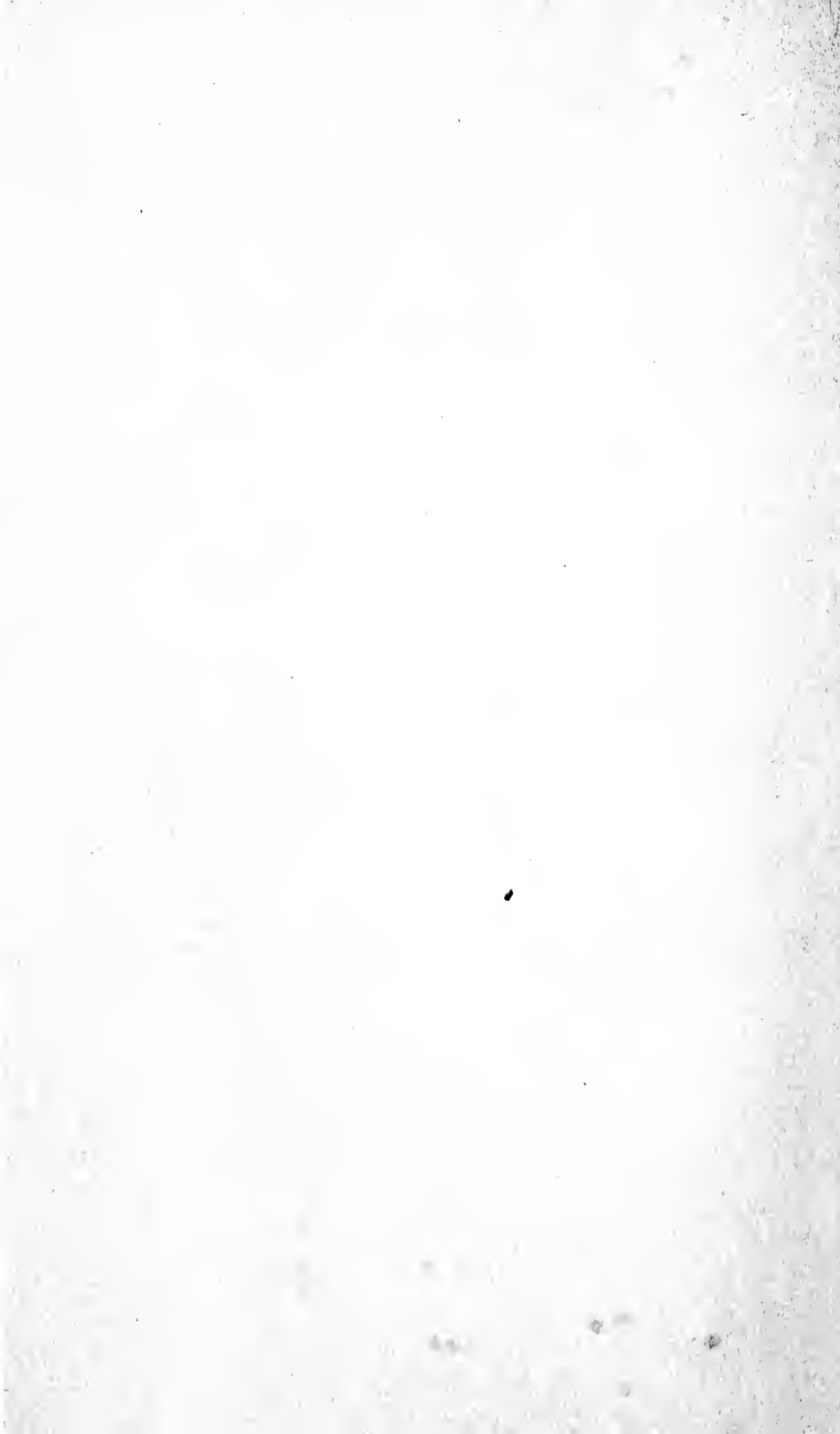
DONALD McGAVICK, Trustee in Bankruptcy of the
Estate of Hyacinth Flickinger,

Appellee.

Brief of Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

DONALD H. MCGAVICK
EDWARD M. LANE
Attorneys for the Appellee



No. 15921

United States
Court of Appeals
FOR THE NINTH CIRCUIT

HYACINTH FLICKINGER,

Appellant,

vs.

DONALD McGAVICK, Trustee in Bankruptcy of the
Estate of Hyacinth Flickinger,

Appellee.

Brief of Appellee

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FOR THE WESTERN DISTRICT OF WASHINGTON,
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DONALD H. MCGAVICK
EDWARD M. LANE
Attorneys for the Appellee



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**STATEMENT OF THE PLEADINGS AND FACTS DIS-
CLOSING THE BASIS UPON WHICH THE DISTRICT
COURT HAD JURISDICTION AND THE COURT OF
APPEALS HAS JURISDICTION TO REVIEW THE
ORDER AUTHORIZING THE SALE OF THE REAL
PROPERTY OF THE BANKRUPT.**

Jurisdiction of Court of Appeals, Ninth Circuit

The bankrupt, the appellant herein, voluntarily petitioned the United States District Court for the Western District of Washington for an adjudication of bankruptcy on the 14th day of May, 1957, pursuant to 11 U. S. C. A., Sec. 11, and was adjudicated bankrupt on the 15th day of May, 1957, by the said district court.

The statutory requirements of domicile were alleged and proven. The trustee, the appellee herein, was appointed on the 4th day of June, 1957, and qualified by giving the required bond.

On the 19th day of August, 1957, the trustee petitioned the referee in bankruptcy for an order authorizing the sale of the property of the bankrupt. Said petition was opposed by the bankrupt. On the 25th day of September, 1957, the referee in bankruptcy entered an order authorizing such sale. (Transcript of Record, Page 28.) On the 3rd day of October, 1957, the bankrupt filed a petition for review by the district court of said order entered by the referee. (Transcript of Record, page 24.) The said matter was argued before the district judge, Honorable George H. Boldt, and the order was entered on the 13th day of December, 1957. (Transcript of Record, Page 11.)

On the 23rd day of December, 1957, a motion by the bankrupt was made for reconsideration of the said court's decision, and the said motion was denied and an order to that effect filed on the 2nd day of January, 1958. (Transcript of Record, Page 16.)

Pursuant to 11 U. S. C. A., Sec. 48, the bankrupt served and filed notice of appeal (Transcript of Record, Page 17) on the 24th day of January, 1958, and paid into the registry of the court the sum of \$250.00 as and for an appeal bond. The transcript of record was subsequently received by the appellant and the appellee and, pursuant to Rule 18, Sec. 1, of the United States Court of Appeals for the Ninth Circuit, the appellant served and filed, within thirty days from receipt of such transcript of record, her brief.

Therefore, this matter is properly before the Ninth Circuit Court of Appeals at this time.

ARGUMENT

Fredrick F. Flickinger, the husband of the bankrupt herein, died November 5, 1956. Probate of the estate, which was all community property, was commenced on December 4, 1956, in the Superior Court of Pierce County, State of Washington. Appraisers were appointed to appraise the said estate as to its value at the time of the decedent's death. The said appraisers found the value of the estate to be approximately \$11,900.00, and, upon the petition of the surviving spouse, the bankrupt herein, pursuant to the laws of the State of Washington, the property was awarded

to her in lieu of homestead by order of the probate court on March 26, 1957, and the probate estate closed.

Subsequently to said award in lieu of homestead and prior to the filing of the petition for bankruptcy, the bankrupt executed a declaration of homestead claiming her interest in the home to be of a value not exceeding \$4,800.00. On the 14th day of May, 1957, the appellant filed her petition in bankruptcy and was adjudicated bankrupt on the 15th day of May, 1957. Thereafter the appellee was appointed trustee and qualified. The referee in bankruptcy appointed a competent appraiser and said appraiser submitted an appraisal of the real estate of the bankrupt showing a value of \$15,000.00, which property was subject to a mortgage of \$5,200.00, and a declaration of homestead of \$4,800.00 as declared by the bankrupt, leaving a net balance for the benefit of creditors in the amount of \$5,000.00.

It is the appellant's position that the value of the bankrupt's estate is res judicata insofar as the bankruptcy court and trustee are concerned, in that the value as found by the state court is binding on the bankruptcy court.

It is the appellee's position that the appraisal made in the probate of the estate of Fredrick F. Flickinger is in no way controlling on the bankruptcy court.

A BANKRUPT, UPON PETITIONING THE DISTRICT COURT FOR ADJUDICATION OF BANKRUPTCY, SUBMITS ALL OF THE PETITIONER'S PROPERTY TO THE JURISDICTION OF THE BANKRUPTCY COURT.

Jurisdiction of Bankruptcy Court

At the time the appellant submitted her petition in the bankruptcy court, the court obtained jurisdiction over all the assets and the trustee was vested with title to all property except that which is found to be exempt, and the bankruptcy court was empowered to order the sale of the property for the benefit of creditors, determine exemptions and decide all controversies relating thereto.

In 11 U. S. C. A., Sec. 110, *Title to Property*:

“(a) The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered . . .

“(c) . . . The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed

vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.”

In the case of *In re Miller*, 95 F (2d) 441, the Court held on page 442, that:

“The bankruptcy court has jurisdiction and power to sell property of a bankrupt estate free from incumbrances . . . *Van Huffel vs. Harkelrode*, 76 L. Ed. 256, 78 A. L. R. 453. Whether it should take jurisdiction of incumbered property, however, is within the sound discretion of the court. *Federal Land Bank of Baltimore vs. Kuntz*, 4 Cir., 70 F (2d) 46. Ordinarily, the power to sell free of liens . . . should not be exercised unless there is some equity for the general creditors or some other benefit likely to inure to the estate.’ ”

And on page 443, the Court said:

“The court of bankruptcy, . . . as a court of equity, had full power and authority to follow substantially the procedure provided by the statutes of Illinois by directing a sale and ordering the exemption satisfied therefrom.”

In the case of *City & County of Denver vs. Warner*, 169 F (2d) 508 (Tenth Cir., 1948), at page 510, the Court stated that:

“Upon adjudication in bankruptcy all of the property of the bankrupt, both real and personal, wherever located is drawn to the jurisdiction of the Bankruptcy Court. *Fish vs. East*, 10 Cir., 114 F (2d) 177, 192. The trustee succeeds to the title of all the bankrupt’s property or his rights therein, as of the date of the filing of the petition in bankruptcy. See Section 70, sub. a of the Bankruptcy

Act, 52 Stat. 879, 11 U. S. C. A. Sec. 110, sub. 2; *Collier on Bankruptcy*, 14th Ed., Vol. 4, Section 70.04, p. 943. And, the Bankruptcy Court becomes vested with exclusive jurisdiction of all the property in either the actual or constructive possession of the bankrupt. *Mueller vs. Nugent*, 184 U. S. 1, 22 S. Ct. 269, 46 L. Ed. 405 It is authorized to collect the property, reduce it to money, distribute it, and determine controversies in relation thereto. See Section 2, sub. a. (7) of the Act, 52 Stat. 842, 11 U. S. C. A., Section 11, sub. a (7). To that end, it may make such orders, issue such process and enter such judgments in addition to those specifically provided for, as may be necessary to enforce the provisions of the Act. Section 2, sub. a (15)."

This case was later cited in *Inter-State National Bank of Kansas City vs. Luther*, 221 F (2d) 382, (10th Cir., 1955). At page 389 it was held that: •

" . . . The rule generally applicable in bankruptcy to the effect that once jurisdiction of a bankruptcy court has been invoked, whether by the debtor or the creditor, the petitioner risks 'all of the disadvantages which may flow to him as a consequence as well as gaining all of the benefits.' *Case vs. Los Angeles Lumber*, 308 U. S. 106, 60 S. Ct. 1, 12, 84 L. Ed. 110

"The bankruptcy court has exclusive and summary jurisdiction to allow or disallow claims against bankrupt estates. Bankruptcy Act. Sec. 2, sub. 2. In the exercise of that jurisdiction, it 'sits as a court of equity' clothed with jurisdiction 'to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate'. *Pepper vs. Litton*, 308 U. S. 295, 60 S. Ct. 238, 246, 84 L. Ed. 281."

Probate of Estate Closed

The appellant relies strongly on *In re Naslund*, 6 Fed. Supp. 109, for the proposition that, once the state court obtained jurisdiction to determine the value of the homestead exemption, the bankruptcy court was bound by that determination, but failed to distinguish the facts in that case from those of the instant case. In the *Naslund* case the estate was still being administered by the probate court of the Superior Court of the State of Washington. The jurisdiction of the probate court attached prior to the filing of the bankruptcy and was still in existence at the time of filing the petition in the bankruptcy court. It is a well-established rule of law that once a court obtains jurisdiction it retains it until the matter before it is completed. *In re Naslund*, supra. The court held in the *Naslund* case that, inasmuch as the state court acquired jurisdiction in the administration of the estate, it would retain jurisdiction until disposed of in the manner provided by law. In the case now before the court the probate of the estate was closed for some time prior to the appellant invoking the jurisdiction of the bankruptcy court.

The value of the estate as fixed by the probate court was determined as of the date of death of the decedent. The value fixed by the court in bankruptcy was determined as of the date of filing the petition in bankruptcy. The value at the time of the adjudication of bankruptcy is the controlling factor in this case. It is noteworthy that there has been no allegation or proof

submitted by the appellant that the value of the property is less than as stated by the appraiser appointed by the referee in bankruptcy. The length of time between the closing of the probate proceedings and the subsequent filing of the petition in bankruptcy, whether it be one month, six months or ten years, would have no bearing as to the right of the bankruptcy court to determine the value of the bankrupt's estate or the proper exemption to be awarded to the bankrupt.

Exemptions

Under the provisions of 11 U. S. C. A., Sec. 11, supra, and 11 U. S. C. A., Sec. 24, "*Exemptions*":

"The provisions of this title should not affect the allowance to bankrupts and the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition."

The bankruptcy court, acting through the referee has the right to determine the validity of exemptions claimed. *In re Gordon's Estate*, 44 F (2d) 810.

The bankruptcy court has power to order sale of exempt property where its value exceeds the exemption allowable and the property is indivisible. It is stated in *Collier on Bankruptcy*, 14th edition, Vol. 1, page 803, under Section 6.05:

"A court of bankruptcy has jurisdiction to determine the merits of the bankrupt's claim to

exemptions but, as a rule, has no jurisdiction over the property claimed except to set it aside for his use and cannot order its sale, except where the exempt and non-exempt property are indivisible. This jurisdiction, so far as it goes, is *exclusive*, and the decision of the bankruptcy court as to the right of exemption, unless absolutely void, cannot be questioned in a collateral proceeding.”

In *Collier on Bankruptcy*, supra, Sec. 6.20, page 881—Sale by Trustee; Exemption out of Proceeds. Where Property is Inseparable, it is said:

“While, as a rule, the trustee has no power to sell the bankrupt’s exempt property, he may be authorized to sell it where it is inseparable from other property, not exempt, and exemptions will be allowed out of the proceeds.”

Cites *Bank of Nez Perce vs. Pindel* (CCA, 9th Cir.) 193 Fed. 917.

The Bankruptcy Court has exclusive jurisdiction to determine the validity and amount of claims and exemptions for and against the bankrupt. It is stated in *Collier on Bankruptcy*, supra, Sec. 6.23, page 889. Proof Required for Allowance of Exemptions:

“The bankrupt should show by a preponderance of proof that he is entitled to the exemption where there is an issue as to whether the exemption is allowable. The burden of proof rests upon the claimant of the exemption; he must bring himself and his property clearly within the statute relied upon.

“The bankrupt is not entitled . . . to a trial by jury of the issues raised by objections, and the referee’s findings of fact will not be disturbed unless clearly erroneous.”

In *Hancock Mutual Life Ins. Co. vs. Wagner*, 174 Wash. 185 (1933) on page 188, the Court states:

“The purpose of setting forth the value of the premises is to give notice to the world whether or not the value was within the statutory limit, and, if not, the excess above such limit Moreover, the estimate of value made by a homestead declarant is not conclusive either upon the declarant, the court, or any interested party. *Nelson vs. McKeen*, 165 Wash. 274.”

Summation

Prior to the time of filing the petition in bankruptcy, none of the estate of the bankrupt was subject to the jurisdiction of any court. Upon the filing of the said petition in bankruptcy the appellant submitted all of her property to the said court and the court then had exclusive jurisdiction to determine the value thereof and to allow any exemptions that the bankrupt may be entitled to under the laws of the State of Washington. This the trustee has endeavored to do.

The bankruptcy act was enacted for the purpose of shielding debtors from creditors under certain given circumstances. However, it was never intended to be a means by which a debtor could evade legal obligations while having more than adequate funds and assets with which to pay creditors.

The district court's judgment should be affirmed.

Respectfully submitted,

DONALD H. MCGAVICK
EDWARD M. LANE
Attorneys for the Appellee

No. 15921

In the
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

IN THE MATTER OF
HYACINTH M. FLICKINGER, Bankrupt,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

Appellant's Reply Brief

O. O. McLANE,
J. PETER P. HEALY,
Attorneys for Appellant

918 Puget Sound Bank Bldg.
Tacoma, Washington

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1. On Page 3 of Appellee's Brief it is recited that "said appraiser submitted an appraisal of the real estate of the bankrupt showing a value of \$15,000.00, which property was subject to a mortgage of \$5,200.00, * * * ". The truth of the matter is that the appraiser appointed by the Trustee made a return reciting "he believed he could sell the homestead for \$15,000.00". (Transcript page 37)

2. On Page 4 of Appellee's Brief in quoting from 11 U. S. C. A., Sec. 110 (c), the Appellee appears to claim and the District Judge decided that any creditor "could have obtained a lien" on this homestead. In order to do that it would have been necessary for the alleged creditor to have contested the homestead claim of the bankrupt in the Superior Court for Pierce County under the provisions of R.C.W. 6.12.090, which was not done. And Appellant contends that there is no other way that any creditor could have obtained a lien against Appellant's homestead. To do so would be to wipe out the plain provisions of said state statute.

In the probate case the Superior Court declared this identical property free and clear of all claim which have or could have been filed in the probate case (Tr. of record, Page 5) and all claims listed or filed in the Bankruptcy Proceedings were pre-existing claims prior to the death of Frederick F. Flickinger (Tr. of record, Page 9) and there were no mechanics or other liens (Tr. of record, Page 9).

3. On Page 5 of Appellee's Brief there is a quotation from *In re Miller* at page 443 to the effect that

the Bankruptcy Court “had full power and authority to follow substantially the procedure provided by the statutes of Illinois by directing a sale and ordering the exemption satisfied * * * ”. All we are doing in this appeal is trying to get the Bankruptcy Court to “follow substantially the procedure provided by the statutes” of the State of Washington.

4. On the last paragraph of Appellee’s Brief on Page 7 the statement that the value of the estate in probate was determined as of the date of death of the decedent, is erroneous. See *in re Small’s Estate*, 27 W.2d. 680 where the Washington Supreme Court said:

“The value of the property should have been computed as of the time the Petition was filed for setting aside property to the surviving spouse in lieu of homestead, which was the date the surviving spouse first asserted her claim.”

(Citing an Illinois case, 82 N.E. 888)

5. On Page 8 of Appellee’s Brief it is recited that the length of time between the closing of probate and filing bankruptcy Petition “would have no bearing as to the right of the Bankruptcy Court to determine the value of the bankrupt’s estate or the property exemption to be awarded to the bankrupt.” We doubt that statement particularly with reference to the exemption. The motive for the statement appears to be the same as in the previous item noticed herein the effort to wipe out the effect of the provisions of R.C.W. 6.12.090.

6. At the bottom of paragraph 8 the quote “validity of exemptions claimed” and in the last line

“the merits of the bankrupt’s claim to exemptions” seem to be confused. The language of the bankruptcy law is: “Determine all claims of bankrupts to their exemptions,” Sec. 2a (11); the text in Collier’s Bankruptcy Manual, Sec. 6.01 recites:

“A court of bankruptcy has jurisdiction to determine the merits of the bankrupt’s claim to exemptions but, as a rule, has no jurisdiction over the property claimed except to set it aside for his use and cannot order its sale, except where the exempt and non-exempt property are indivisible.”

“As soon as the right of the bankrupt to the exemption claimed is determined, however, the court’s jurisdiction over the exempt property ceases and the court has no further control over it.”

“The rule is now well settled that the Bankruptcy Court has no jurisdiction to enforce a lien or claim upon exempt property and that such matters must be litigated, usually in the state courts.”

We contend that there is no proof nor claim of any kind in this whole case that there is a non-exempt property for two reasons—one that R.C.W. 6.12.090 has not been complied with and that there has been no real appraisal in bankruptcy of the exempt property.

7. At the top of Page 10 of Appellee’s Brief it is recited in the quotation from the Wagner case in Washington that the estimated value by the declarant is not conclusive. We admit that; but the contest on it can be carried on only pursuant to the provisions of R.C.W. 6.12.090; and in said statute it is recited

that the value is "presumed to be valid" until contested as therein provided for BY A COURT OF GENERAL JURISDICTION and finally in the summation the Appellee recites that the trustee has endeavored to "allow any exemptions that the bankrupt may be entitled to under the laws of the State of Washington." If he has so endeavored it is by ignoring and eclipsing entirely the provisions of R.C.W. 6.-12.090.

8. It is to be noted that the Appellee has not in any way except inferentially and erroneously contested any of the statements in the Appellant's Brief and we submit that he could not do so successfully. We invite the Court of Appeals to reverse the decision of the District Judge and of the Referee and to relegate the real claimant to his remedies in the Superior Court under the laws of the State of Washington, and that the Order of the Superior Court declaring this property exempt is Res Judicata.

Respectfully Submitted,

O. O. McLANE

J. PETER P. HEALY

Attorneys for Appellant

No. 15922 ✓

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

EVEREST & JENNINGS, INC., a Corporation,

Appellant,

vs.

E & J MANUFACTURING COMPANY, a Corporation,

Appellee.

E & J MANUFACTURING COMPANY, a Corporation,

Appellant,

vs.

EVEREST & JENNINGS, INC., a Corporation,

Appellee.

**OPENING BRIEF FOR APPELLANT, EVEREST
& JENNINGS, INC.**

FRED H. MILLER,
ALLAN D. MOCKABEE,

By FRED H. MILLER.

108 West Sixth Street,
Los Angeles 14, California,

Attorneys for Everest & Jennings, Inc.

FILED

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PAUL P. O'BRIEN, CLERK



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No. 15922

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EVEREST & JENNINGS, INC., a Corporation,

Appellant,

vs.

E & J MANUFACTURING COMPANY, a Corporation,

Appellee.

E & J MANUFACTURING COMPANY, a Corporation,

Appellant,

vs.

EVEREST & JENNINGS, INC., a Corporation,

Appellee.

OPENING BRIEF FOR APPELLANT, EVEREST & JENNINGS, INC.

Jurisdiction.

The plaintiff brought this suit for the infringement of its trademark "E & J" as applied to "resuscitators, oxygenators and cases especially designed and adapted to ship and carry said resuscitators and oxygenators." The trademark was registered in the United States Patent Office [Pltf. Ex. 1, R. 705.] There is a second count for unfair competition.

Jurisdiction of the Trial Court as to the claim of infringement of the registered trademark is conferred by both 28 USC 1338 and 15 USC 1121. Jurisdiction as to the unfair competition count is conferred by 28 USC 1338(b).

The defendant counterclaimed praying that the Court determine that the defendant had a right to use and to register the trademark "E-J" as applied to invalid wheel chairs. Jurisdiction of the counterclaim was conferred by 15 USC 1119 and 15 USC 1121.

The Appellate jurisdiction of this Court is obtained by 28 USC 1291 and 15 USC 1121.

Statement of the Case.

The plaintiff registered in the United States Patent office the trademark "E & J" as applied to "resuscitators, oxygenators and cases especially designed and adapted to ship and carry said resuscitators and oxygenators" [Pltf. Ex. 1, R. 705.] The application for this registration was filed May 29, 1947, and the registration certificate issued July 27, 1948.

The defendant manufactures and sells invalid wheel chairs and walkers but has never sold resuscitators or oxygenators or anything competitive therewith. Defendant's business was originally started in 1932, by Herbert A. Everest and Harry C. Jennings [R. 363, 375, 421] as copartners. Later, Everest & Jennings, Inc., the defendant named herein was incorporated and the assets of the partnership were transferred to the corporation. Everest has since sold out his entire interest in the corporation [R. 362.]

As the invalid wheel chair business grew during the years following 1932, defendant's invalid wheel chairs became known generally in the trade as "E & J chairs" or "E & J invalid wheel chairs." This terminology was adopted by the trade itself as a nickname for Everest & Jennings chairs or Everest & Jennings invalid wheel chairs. Plaintiff's witnesses and also defendant's witnesses so

testified. Defendant's witnesses Everest [R. 366, 369], Dunn [R. 413.] Plaintiff's witnesses Miller [R. 245-246], Williams [R. 533-534], Garrett [R. 556.] See also

Plaintiff's Exhibit 71, R. 731.

Defendant's Exhibit G, R. 771.

Defendant's Exhibit H, R. 733.

Because the trade and public generally were referring to defendant's products by the term "E & J", defendant, in 1946, proposed adopting the initials "E-J" as a trademark. Defendant had been subjected to rather strenuous wheel chair competition, see *Everest & Jennings, Inc. v. Duke*, 139 F. 2d 22 (CCA 7), certiorari denied, 321 U. S. 779, and feared that should competitors adopt and register the initials "E-J" or "E & J" as applied to invalid wheel chairs, that confusion in the trade would be extensive and at great loss to the defendant. A rather expensive die was procured in 1946 to cast the initials "E-J" on the metal footpads of the chair as a means of readily identifying defendant's wheel chairs as being of defendant's manufacture and standard of quality [R. 366-367, 382-383, 422.] Although each footpad carried the initials "E-J" each footpad also carried the full and complete name "Everest & Jennings" on the underside thereof [R. 377] see Defendant's Exhibit A, a physical exhibit. In addition thereto since 1946 each chair also carried a name plate on the X-brace bearing the name of the defendant in full, the street address of the defendant, and a serial number by which the chair could be identified [R. 377, 409.] Since December, 1952, the defendant in using the initials "E & J" has always had the full name of Everest & Jennings, Inc. somewhere in close proximity thereto [R. 388.]

The plaintiff claims to have been using the initials "E & J" on resuscitators since 1929 [Pltf. Ex. 1, R. 705.] This statement of first use in the certificate of registration is not strictly accurate because plaintiff, E & J Manufacturing Company, a corporation, the registrant, was not incorporated until December, 1945 [R. 681-682, 472.] The initials "E & J" of plaintiff's trademark were derived from the initials of the founders and developers of plaintiff's resuscitators, C. N. Erickson and Dr. Johnston [Request for Admission 66, R. 448.] Plaintiff claims to have derived title therefrom. Considerable doubt, however, exists as to whether plaintiff and plaintiff's predecessors actually used the trademark "E & J" or merely the firm name, "E & J Manufacturing Company," on their resuscitators. Thus, plaintiff's witness, Stanton, testified that Plaintiff's Exhibit 36 was used from 1933 to 1953 [R. 166.] This displays "E & J Manufacturing Co." not merely "E & J." The display of a company name has been repeatedly held not to be a trademark use of any part of it.

I. & B. Cohen, Bomzon & Co., Inc. v. Biltmore, Industries, Inc., 22 USPQ 258;

Duncan Electric Manufacturing Company v. Marshall, 95 USPQ 242, 42 TM. Rep. 919;

Minnesota Mining v. Minnesota Paint Co., 108 USPQ 314, 319, 229 F. 2d 448.

In a suit brought by plaintiff's predecessor for patent infringement, *Erickson, doing business as E & J Manufacturing Co. v. Emerson, doing business as J. H. Emerson Company, et al.*, 61 USPQ 42, 49 (apparently not reported elsewhere), decided in 1944 the name plate ap-

pearing on the front of the apparatus is rather meticulously described by the Trial Judge as consisting of a

“plate 2½” x ½” with the legend in letters ⅛” high ‘E & J Manufacturing Co.’ and in smaller letters ‘Glendale, California.’ ”

For a long period of time the parties to this litigation operated in complete ignorance of the other or its predecessor. Thus plaintiff’s witness Stanton, who was engaged in the exploitation of the resuscitators of plaintiff and plaintiff’s predecessor from 1933 to 1953, never even heard of the defendant or defendant’s predecessor until 1946 [R. 142-143.] Plaintiff’s witness Fox who entered Erickson’s employ in 1928 [R. 674] never knew of defendant’s existence until “* * * 1945, or something like that.” [R. 688-689.] Defendant’s witness, Everest, never heard of plaintiff until he “* * * happened to run into it in the phone book along about 1948.” [R. 372.] This, in spite of the fact that both concerns were located within roughly fifteen miles of each other [R. 395.]

The plaintiff’s goods are primarily resuscitators, oxygenators and allied equipment with prices ranging from \$350. to \$425. [R. 138] and sales were usually made only after a demonstration was made by a competent demonstrator [R. 138.] Usually, final decision to purchase one of plaintiff’s resuscitators required the careful scrutiny and approval by someone in a medical capacity [R. 135.] As testified to by plaintiff’s witness Stanton [R. 135]:

“* * * all of our approach to any sales was medical, Mr. Miller, because the resuscitator is very much medical. It is not a lay apparatus, and no sale or no installation is ever made without the sanction of a group of doctors, prominent doctors

in any community, and every fire department has their medical advisors, and our approach to make a sale at the fire department was always through the hospital or a doctor who was in charge of the rescue service of the fire department.”

Defendant’s invalid wheel chairs, on the other hand, are sold at a much lower average figure and were sold to the general public or laity as well as to hospitals and institutions [R. 403.]

Despite the differences in the construction of resuscitators and invalid wheel chairs, the different use to which these are put, and the careful scrutiny given the plaintiff’s resuscitators by someone of the “medical group” before plaintiff’s resuscitators are purchased, the plaintiff contends that the use by the defendant of defendant’s own initials “E-J” on its wheel chairs is an infringement of its trademark “E & J” as applied to resuscitators, oxygenators, and the like. In support of this contention plaintiff has produced evidence that can be classified in three categories:

- (1) A mistake on the part of the publication Hospital Progress giving credit to Everest & Jennings for having developed a so-called “Resuscinette” (a resuscitator for use with infants) which was in fact developed by the plaintiff and not the defendant. [P. 94-A in Ex. 39.]

- (2) Misaddressed mail containing purchase orders. [Ex. 47 transmitted as a physical exhibit.]

- (3) Erroneous assumptions on the part of purchasing agents and others that when a person identifies himself or is introduced as being affiliated with “E & J” that he is connected with the defendant contrary to fact.

Discussing these in the order named, it is to be observed that no one affiliated with the publisher of Hospital Progress was a purchaser or prospective purchaser of defendant's wheel chairs, or of the plaintiff's resuscitators. For the magazine to give credit to the defendant for the development of the plaintiff's "Resuscinette" was an error, it is true—but it does not appear that this error was occasioned by reason of the defendant having used the initials "E-J" on its wheel chairs as its trademark, or by the defendant having advertised these initials in association with its true corporate name. How this error occurred, defendant has never been able to ascertain and plaintiff has offered no evidence other than the magazine itself. The error could have reasonably occurred by someone in the editorial department erroneously concluding that the true corporate name of the plaintiff E & J Manufacturing Company, was but a nicknaming of the corporate name of the defendant, Everest & Jennings, Inc., and that therefore, in giving credit to the developer of the "Resuscinette" the true name should be given. This was erroneously assumed to be Everest & Jennings, Inc., whose advertisement appears on the same page.

The error on the part of Hospital Progress, although aggravating, is nowhere shown to have resulted in any lost sales to the plaintiff or any gain in sales on the part of the defendant. Had the defendant received any orders for the "Resuscinette" defendant could not have filled them as it did not deal in any such articles or anything equivalent thereto. [R. 95.] Nor could have defendant palmed off a wheel chair as a substitute for the "Resuscinette" as alleged in paragraph 9 of count 2 of plaintiff's complaint [R. 9.]

There had been some misaddressed mail and purchase orders prior to the error committed by Hospital Progress in 1949 [R. 367, 384.] Some orders for defendant's goods were addressed and sent to the plaintiff by mistake. Conversely, some orders for plaintiff's goods were addressed and sent to the defendant by mistake. As neither party was dealing in the goods of the other and consequently could not fill such misaddressed orders, even if it wanted to, the practice was for each party to forward the misaddressed mail to the other party where the order properly belonged [R. 384-385.] This practice was indulged in regularly except where a more controlling reason required that it be returned to the sender [R. 395.] It is manifest, therefore, that no damage has been done the plaintiff and that there has been no palming off of defendant's goods as being those of the plaintiff [R. 199.]

The error on the part of Hospital Progress caused two meetings to be held between officials of the plaintiff and those of the defendant [R. 380-384] the result of which caused the defendant to propose deleting the use of E & J in reference to its wheel chairs in its advertising and in its correspondence in the hope that this would reduce or eliminate misaddressed mail [R. 365-367.] Plaintiff's Exhibit 40 [R. 707] was written to this effect. During the ensuing two years defendant's use of the initials "E-J" in its correspondence and advertising was discontinued [R. 384], but as misaddressed mail persisted, the use of the initials in advertising was resumed in 1952 [R. 386.]

There has been misdirected mail consisting mostly of purchase orders. In the case of plaintiff over half are for replacement parts [Request for admission 69, R. 448-449.]

The majority of these purchase orders come from surgical supply houses and identify the article wanted by its catalogue number—both parties having catalogues. As the article desired is usually so meticulously identified by its catalogue number, it is manifest that the person wishing the article in question or ordering the article must have had a catalogue available at the time that he decided to place his order. The catalogues of both parties carry their correct corporate names. In addition, the street address is displayed as well in the case of the defendant, but only the city address (Glendale or Burbank, California) in the case of the plaintiff. It would seem, therefore, that as the catalogue must have been before the person wishing to place the order, there is little excuse for the failure of the purchase orders being properly addressed. The only reasonable explanation in the case of surgical supply houses, is that the job of typing up and mailing the purchase orders was turned over to secretarial help or typists who assumed that orders for “E & J chairs” as abbreviations for Everest & Jennings chairs, should be sent to the E & J Manufacturing Company. Others who had occasion to type up orders for E & J resuscitators or oxygenators or parts thereof and who were familiar with Everest & Jennings chairs, erroneously assumed that such orders should be properly addressed to the defendant, Everest & Jennings, Inc. Plaintiff’s witness, Miller, describes a typical practice in this regard at R. 248-250.

One of the worst offenders in misaddressing purchase orders was American Hospital Supply Corporation. American Hospital Supply Corporation owns Don Baxter, Inc. [R. 222, 454.] Don Baxter, Inc., in turn, owns E & J Manufacturing Co. [R. 222] so that in effect E & J

Manufacturing Company, the plaintiff herein, is a subsidiary of American Hospital Supply Corporation. One would think that American Hospital Supply Corporation would know what was manufactured and sold by its own subsidiary. However, a casual observation of Exhibit 47 transmitted as a physical exhibit shows that American Hospital Supply Corporation was a serious offender in misdirecting mail to both parties to this proceeding [R. 365, 366.]

In 1956, American Hospital Supply Corporation discontinued purchasing defendant's wheel chairs entirely [Deft. Ex. J, R. 778] probably because after American Hospital Supply Company made overtures to purchase the defendant [R. 428] it purchased another wheel chair company [R. 458.]

Considerable confusion was injected into the trial of this case by plaintiff's attorney's comments and by the comments of the Trial Judge, made during the trial as to what significance, if any these misaddressed letters and orders had [see R. 109-111; 407-409.] If as stated by the Trial Court at R. 409:

“* * * where there is a piece of misdirected mail without the accompaniment of other evidence, I don't look upon it as evidence of anything else other than misdirected mail, which is not a determinative factor in this case.”

then, the evidence of misdirected mail has little if any bearing on the case. It has nowhere been established that whoever misdirected the mail was an actual or potential purchaser of the goods—as distinguished from merely secretarial help having no other interest in the transaction than to earn a living from her employer.

The third category presented by the plaintiff relates to erroneous assumptions made when representatives of the plaintiff introduce themselves as being affiliated with “E & J” instead of E & J Manufacturing Company. An example of this is as testified to by plaintiff’s witness Miller at R. 244:

“* * * I introduced John Dirmann (of plaintiff E & J Manufacturing Co.) to Mr. Hanner, and I said, ‘This is the E & J’s representative.’

“And he said, ‘Ken, we aren’t interested in buying wheelchairs right now.’”

Plaintiff’s witness Dirmann tells substantially the same story [R. 313.]

Manifestly, if a man merely introduces himself or is introduced as an “E & J” man [R. 313], this could signify most anything. The plaintiff’s name is not merely E & J but instead is E & J Manufacturing Company. If the introducer seeks to shorten the true name to merely E & J as a nickname he should be prepared to suffer the consequences of possible mistake or confusion. To merely identify himself as an “E & J man” or as a “man from E & J” could rightfully signify a representative of any one of five different concerns currently doing business under the name of E & J or EJ in Los Angeles alone [see Request for Admission 67, R. 448.] Also, it could signify a representative of any one of the long list of E & J concerns in Chicago [R. 498-500] or even a representative of E & J Lab in Kansas City, Missouri [R. 612.] Also, it could signify a representative of The E & J Company of Pennsylvania [R. 115] or the E & J Company of New England [R. 117] or E & J Resuscitator Company of Chicago [R. 118.] Other than being

exclusive distributors of plaintiff's products in certain territories, none of these last three concerns had any connection with the plaintiff.

Likewise a mere identification of a man as being an "E & J man" or a "man from E & J" could signify a representative of almost any one of the registrants of the prior registrations copies of which are included in the Record at 739 to 770, see particularly Reg. 81511 to Edmunds & Jones Mfg. Co.

Plaintiff's witness, Ken Healy, likewise testified that he introduced himself as

"I'm Ken Healy with E & J."

which was erroneously assumed to have signified that he was with Everest & Jennings [R. 620] rather than the plaintiff. Plaintiff's witness, Price testified that when he approached Mr. Persik and said

"‘Mr. Persik, we handle the E & J resuscitator.’"

Persik said:

"‘Mr. Price, I already have a deal on with E & J.’"

meaning Everest & Jennings [R. 641, 654.]

Plaintiff's witness, Armstrong, testified that he had been asked whether E & J Manufacturing Company, the plaintiff, was a subsidiary of Everest & Jennings, the defendant [R. 487.] However, he also testified that there had been instances of confusion between the plaintiff and plaintiff's competitor, Emerson presumably

"* * * because we both use 'E' in the company name, they both start with an 'E'." [R. 495.]

Emerson is a competitor of plaintiff in the resuscitator business [R. 113.] Plaintiff's witness Garrett, testified

that when E & J Manufacturing Company's representative called the day after an Everest & Jennings representative had called at his place of business and discussed matters with his mother, Garrett was informed "that the E & J representative was here to see me." He erroneously assumed that the E & J representative was the same Everest & Jennings representative that had called the day before and he had no time to go over again the same matters that had been discussed the day before with Garrett's mother.

Comparing the facts of this case with the facts of *Sunbeam Lighting Co. v. Sunbeam Corp.*, 183 F. 2d 969 (CCA 9), it is manifest that if a sales representative of either party to that litigation introduced himself by saying "I'm from Sunbeam" there would be similar mistakes as to who he actually was affiliated with.

The significant part of all of this record is that nowhere does it appear that purchasers or prospective purchasers have in any way been confused, mistaken, or deceived by reason of the defendant having used the initials "E-J" on its wheel chairs, or from the defendant having advertised the initials "E & J" in advertising its wheel chairs. [See Requests for Admissions, 14, 15 and 16, R. 433-434.] This could hardly be because the defendant's full corporate name and address have always appeared in close proximity to the initials "E-J" wherever they have appeared [R. 388, 611, Deft. Ex. A.]

The statute, 15 USC 1114 provides:

"Any person who shall * * * copy * * * any registered mark in connection with the sale, or advertising of any goods * * * on or in connection with which such use is likely to cause confusion

or mistake, or to deceive purchasers as to the source of origin of such goods * * * shall be liable * * *.”

The Trial Court in its oral opinion [R. 479] jumps to the conclusion that

“Confusion is not only possible, it is almost bound to occur in the future, and it has certainly occurred in the past * * *.”

However, in so holding

(1) It ignores the question of whether defendant’s “use (of the initials E & J *on its wheel chairs*) is likely to cause confusion or mistake, or to deceive purchasers as to the source of origin of such goods * * *” or whether the confusion or mistakes made have been merely due to the similarity of the corporate names of the plaintiff and the defendant. Section 1114 of Title 15 provides a remedy only where the use of the trademarks is likely to cause confusion or mistake. It provides no remedy whatsoever if confusion or mistake results merely from the rightful use of one’s own name which happens to be similar to the plaintiff’s, or a rightful use of the initials thereof which, as testified to by plaintiff’s witness Garrett [R. 556.]

“* * * it is considerably easier for us to call them E & J than Everest & Jennings.”

(2) The Court also erred in assuming that in enacting the Lanham Act and particularly Title 15, Section 1114, Congress purported to change the enormous body of case law which preceded it to the effect that one had a right to use honestly and fairly his own name on his goods and abbreviations thereof; and

(3) The Court erred in assuming that Section 1114 is to be taken literally and at face value with the result that any confusion or mistake whatsoever that can in any way be possibly attributed to the defendant's use of the mark justifies relief. The Second Circuit Court of Appeals has held that this section did not purport to reverse the case law which preceded it but to merely codify it. Further, that the section is not to be taken literally.

S. C. Johnson & Sons, Inc. v. Johnson, 175 F. 2d 176, 81 USPQ 509, certiorari denied, 338 U. S. 860;

American Chicle Co. v. Topps Chewing Gum Inc., 208 F. 2d 560, 99 USPQ 362.

This Court is apparently of the same opinion by reason of its quotation from and its citation of the *Johnson* case (*supra*) in *Sunbeam Furniture Corp. v. Sunbeam Corp.*, 191 F. 2d 141, 90 USPQ 43. As stated by this Court in *Sunbeam Lighting Co. v. Sunbeam Corp.*, 183 F. 2d 969, 86 USPQ 240:

“As to issue numbered ‘2’ the case is not solved by the simple finding as to whether defendant's use of the word ‘Sunbeam’ results ‘in confusion and likelihood of confusion.’ The answer to that question is material but circumstances not included in the framed statement must be taken into consideration.”

Furthermore, it is manifest that the section cannot be interpreted literally and at face value because it provides the same remedy with respect to “any registered mark” which would include those registrable only on the Supplemental Register which, under Title 15, Section 1091,

includes surnames, geographical names, and descriptive terms. In this respect, 15 USC 1114 is broader than Section 6 of the Trademark Act of 1920, which was interpreted in *Armstrong v. Nu-Enamel*, 305 U. S. 315, as restricted to “owners.”

That it was not the intention of Congress in enacting the present Lanham Trademark Act to abandon the case law which preceded it is deduced from 15 USC 1115(a). This section after creating the *prima facie* presumption for registrations obtained under the Acts of 1881, 1905, and on the Principal Register of the present Act, specifically provides:

“* * * but shall not preclude an opposing party from proving any legal or equitable defense or defect which might have been asserted if such mark had not been registered.”

The present Act cannot be literally interpreted to the effect that any instances of confusion or mistake are sufficient but must be interpreted in the light of preceding case law and other circumstances.

In March, 1952, defendant filed an application to register “E-J” as applied to invalid wheel chairs. The application was allowed by the Examiner regardless of the coexistence of plaintiff’s registration. Publication of defendant’s mark was ordered and made in the Patent Office Official Gazette in the usual manner. Plaintiff instituted an opposition proceeding resulting in a decision being rendered by the Examiner of Interferences sustaining the opposition. A copy of the opinion was offered as Plaintiff’s Exhibit 56 and rejected by the Trial Court [R. 254-257] but as the Trial Court at the same time stated that it would “take judicial knowledge of a

decision in the Patent Office" R. 256, it is believed that this opinion unduly influenced the Trial Court as to its conclusion that there was confusion within the meaning of the term as used in the Act.

An appeal was filed by the defendant from the decision of the Examiner of Interferences. This appeal on plaintiff's motion and over defendant's opposition was stayed because of the pendency of the present proceeding. It seems to be the discretionary practice of the Commissioner of Patents to stay proceedings in opposition proceedings if there is a civil action pending between the same parties involving the same subject matter. *Squirrel Brand Co. v. Barnard Nut Co.*, 101 USPQ 340. The Commissioner of Patents takes the view as stated therein:

"Simply stated, if the court concludes that this defendant (applicant) has the right to use its mark in commerce it has the right to register * * *."

Believing as we do that the defendant has the right to use its own initials on its own invalid wheel chairs and walkers, the defendant filed its counterclaim [R. 18] praying [R. 22]:

"That in accordance with the provisions of 15 USC 1119 this Court determine that the defendant has the right to use the trade-mark 'E-J' as applied to invalid wheel chairs, and consequently has the right to register the same in the United States Patent Office as applied to said goods, and that a decree or order to this effect be certified by the Court to the Commissioner."

Specification of Errors.

The Trial Court found that

“* * * defendant’s trade-mark originated by the gradual process of defendant’s customers’ spontaneous abbreviation of the firm name Everest & Jennings, Inc.” [Finding 8, R. 28.]

It also found

“The original mark ‘Everest & Jennings’ did not cause any confusion.” [Finding 11, R. 29.]

Further it found

“With a large segment of wheel chair users, the mark ‘E-J’ is understood to refer only to defendant’s product and plaintiff’s goods are unknown to those wheel chair users.” [Finding 15, R. 29.]

However, it also found

“There is a large sales area of products of plaintiff and defendant which are common to both parties. Confusion as to the origin of the goods is not only possible in such areas but is almost bound to occur in the future if such similar trade-marks are used, and it certainly has occurred in the past.” [Finding 15, R. 29.]

For this reason, the Trial Court concluded

“Defendant’s use of the trade-mark ‘E-J’ has resulted in confusion as to the origin of the goods sold with said trade-mark applied thereon and is, therefore an infringement of plaintiff’s registered trade-mark. * * * Such infringement was without intent to infringe.” [Finding 13, R. 29; Conclusion of Law 4, R. 30.]

(Note: In its oral opinion, R. 479, the Trial Court said

“Confusion is not only possible, it is almost bound to occur in the future, and it has certainly occurred in the past; this without any intent on the part of the defendant company to *defraud*.”)

The conclusion reached by the Trial Court disregards the principle of law that anyone is entitled to use his own name on his products or any abbreviation thereof by which he is popularly known, and as long as he does so reasonably and honestly, it is immaterial whether some portion of the trade or public are confused or mistaken as long as they are not deceived. Without abandoning other errors this is the basis for the following errors expressed as statement of points [R. 701]:

“XI.

“The District Court erred in finding that the use of the trade-mark ‘E-J’ on wheel chairs has resulted in actual confusion to customers as to the origin of the goods sold with the trade-mark ‘E-J’ applied thereon.

“XII.

“The District Court erred in receiving in evidence mis-addressed letters and mis-addressed purchase orders without proper authentication of them as proof of confusion resulting from defendant’s use of the initials ‘E-J’ on its invalid wheel chairs and walkers.

“XIII.

“The District Court erred in failing to find that any confusion that has resulted is due entirely to the similarity in the names of the plaintiff and the defendant, the similarity in nicknames or abbreviations

thereof assigned to the plaintiff and the defendant by the trade and that confusion, if any, was not due to the applications of trade-marks by the parties to their respective goods.

“XV.

“The District Court erred in finding that defendant’s use of the trade-mark ‘E-J’ has resulted in confusion as to the origin of the goods sold with the trade-mark applied thereon and that it is therefore an infringement.

“XVI.

“The District Court erred in failing to find that defendant’s use of ‘E-J’ or ‘E & J’ on its goods (wheel chairs and walkers) was a legitimate, fair use of the initials of its own name and that as this was done honestly and fairly with no attempt to misrepresent or deceive or to cause mistake on the part of purchasers, defendant has committed no wrong.

“XVII.

“The District Court erred in assuming that any confusion or mistake regardless of its cause is sufficient to award the remedies under 15 USC 1114(1).

“XVIII.

“The District Court erred in finding that confusion as to the origin of the goods of plaintiff and defendant is not only possible but is almost bound to occur and has occurred in the past if this finding is attributed to the use of the trade-mark ‘E-J’ by the defendant to the defendant’s goods.”

Argument.

A defendant has the right to use his own surname on the products that he manufactures and sells, and as long as he does so fairly and honestly, it is immaterial that he may interfere with and injure the business of another using the same name.

Howe Scale Co. v. Wyckoff Seamans and Benedict, 198 U. S. 118, 136;

Horlick's Malted Milk Corp. v. Horlick, 143 F. 2d 32 (CCA 7);

Horlick's Malted Milk Corp. v. Horluck's, Inc., 59 F. 2d 13, 13 USPQ 296;

Lerner Stores v. Lerner, 162 F. 2d 160, 73 USPQ 524.

Whenever two persons having the same name or highly similar names engaged in the same or similar lines of business some confusion or mistake on the part of the careless or ignorant is almost bound to occur. However, as stated in *Howe Scale Co. v. Wyckoff*, 198 U. S. 118, 140:

“Having the right to that use, courts will not interfere where the only confusion, if any, results from a similarity of the names and not from the manner of the use. The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant the action fails.

“As observed by Mr. Justice Strong in the leading case of *Canal Company vs. Clark*, 13 Wall. 311

‘Purchasers may be mistaken, but they are not deceived by false representations and equity will not enjoin against telling the truth.’ And by Mr. Justice Clifford in *McLean vs. Fleming*, 96 U. S. 245 ‘A court of equity will not interfere when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other.’ And by Mr. Justice Jackson in *Columbia Mills Company vs. Alcorn*, 150 U. S. 460, ‘Even in the case of a valid trade mark the similarity of brands must be such as to mislead the ordinary observer.’ And see *Coats vs. Merrick Thread Company*, 149 U. S. 462; *Liggett & Myers Tobacco Company vs. Finzer*, 128 U. S. 182.

“We hold that, in the absence of contract, fraud or estoppel, *any man may use his own name, in all legitimate ways*, and as the whole or a part of a corporate name.” (Emphasis added.)

In *Canal Co. v. Clark*, 13 Wall. 311, 327:

“True it may be that the use by a second producer, in describing truthfully his product, of a name, or a combination of words already in use by another who just applied it, may have the effect of causing the public to mistake as to the origin or ownership of the product, but if it is just as true in the applications to his goods as it is of those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. *Purchasers may be mistaken, but they are not deceived by false representations and equity will not enjoin against telling the truth.* (Emphasis added.) (P. 328.)

“If the public are led into mistake, it is by the truth, not by any false pretense.”

As stated in *Schwartz v. Slenderella Systems of California, Inc.*, 271 P. 2d 857, 44 TM Rep. 1170, 102 USPQ 177, 178:

“To hold that confusion of source as to his products and the respondent’s services will be unlikely, Schwartz contends, is to ignore the factual instances of confusion shown by the evidence. He asserts that the trial court has negated the serious aspects of such confusion. Here the parties cater to the same class of the public, the argument continues ‘and it is not difficult to perceive that both appellant and respondent are competing for the same purchasing dollar.’

“Although factual instances of confusion may support a determination that confusion of the public is likely from the use of identical or similar trade names, *they do not compel that conclusion as a matter of law.* Palmer v. Gulf Publishing Co., 79 F. Supp. 731, 738, 78 USPQ 349, 355; Lerner Stores Corp. v. Lerner, 162 F. 2d 160, 163, 73 USPQ 524, 526; American Auto. Ins. Co. v. American Auto Club, 184 F. 2d 407, 410, 87 USPQ 59, 61-62.” (Emphasis added.)

The principle that every man has the right to use his own name reasonably and honestly extends not only to his surname itself but to initials, nicknames, and to names by which he is generally known.

H. Mueller Mfg. Co. v. A. Y. McDonalby and Morrison Mfg. Co., 132 Fed. 585, 586; on appeal, 183 Fed. 972, 973;

Ida May Co. v. Ensign, 20 Cal. App. 2d 339;

Elize Costume Co. v. Mme. Elize Inc., 206 App. Div. 503;

D & W Food Corporation et al. v. Graham, 286 P. 2d 77, 107 USPQ 24.

A second user of a person's own name or a derivation or an abbreviation thereof will be subject to stricter limitations on the use thereof when he is competing in the first user's own market than where he is the first to enter an entirely new even though closely related market.

S. C. Johnson & Son, Inc. v. Johnson, 116 F. 2d 427, 48 USPQ 82;

Emerson Electric Mfg. Co. v. Emerson Radio, 105 F. 2d 908, 42 USPQ 286.

It is only where there has been an element of concealment or suppression of the true identity of the accused infringer who uses his initials which are the same as those of another's trademark that relief has been granted.

Great Atlantic & Pacific Tea Co. v. A & P Radio Stores, 20 Fed. Supp. 703, 705;

Radio Corporation of America v. RCA Rubber Co., 114 Fed. Supp. 462, 97 USPQ 536, 537;

Cf. Alexander Young Distilling Co. v. National Distillers Products Corp., 40 Fed. Supp. 748, 51 USPQ 41.

No such concealment or suppression appears in the present case because the defendant's true full name and address always appears in close proximity to the initials "E-J" both on defendant's chairs themselves and in defendant's advertising [R. 377 and 388.]

In *Lerner Stores Corporation v. Lerner*, 162 F. 2d 160, 73 USPQ 524, the criterion for distinction was stated as follows:

"The element of false advertising or other conduct designed to mislead the public or cause confusion which was controlling in the cited cases, is absent here."

In *Horlick's Malted Milk Corporation v. Horluck's*, 59 F. 2d 13, 13 USPQ 296, this Court quoted with approval Mr. Justice Holmes in *Herring-Hall-Marvin Safe Co. v. Hall's Safe Co.*, 208 U. S. 554, 559, as follows:

“The principle of the duty to explain is recognized in *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118. It is not confined to words that can be made a trade-mark in a full sense. The name of a person or a town may have become so associated with a particular product that the mere attaching of that name to a similar product without more would have all the effect of a falsehood. *Walter Baker & Co. v. Slack*, 130 Fed. 514. An absolute prohibition against using the name would carry trade-marks too far. Therefore the rights of the two parties have been reconciled by allowing the use, provided that an explanation is attached. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 200, 204; *Brinsmead v. Brinsmead*, 13 Times L. R. 3; *Reddaway v. Banham* (1896), A. C. 210, 222; *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85, 87; *Dodge Stationery Co. v. Dodge*, 145 Cal. 380. *Of course the explanation must accompany the use, so as to give the antidote with the bane.*” (Emphasis added.)

Here, the parties to this litigation are unfortunate in that they have the same initials or nicknames as a multitude of other concerns employing the same initials throughout the United States. The defendant has not adopted the initials “E & J” for the purpose of acquiring some of plaintiff’s business or depriving plaintiff of business. It is merely attempting to advertise in a convenient manner its own name. In supplying “the antidote with

the bane” there is little more that the defendant could do than to apply its full name on the underside of the footpads where its initials appear and applying a name plate to the wheel chairs carrying the defendant’s full name and street address. The footpads are frequently swung up into vertical position to expose the name of defendant on the underside thereof. Furthermore, in its advertising it has closely associated with the display of the initials “E & J” its full name and address.

As it was the trade itself that commenced referring to the defendant’s invalid wheel chairs as “E & J chairs” long before the defendant began a trademark use of these initials on the chairs themselves in 1946, it is manifest that this practice of referring to defendant’s wheel chairs as “E & J chairs” will persist or continue whether defendant is enjoined from using the initials on the chairs themselves or not. The initials “E & J” are not and never can be a strong trademark. The distinction between strong and weak trademarks has been pointedly acknowledged by this Court in *Sunbeam Lighting Co. v. Sunbeam Corp.*, 183 F. 2d 969, 40 TM. Rep. 669, 86 USPQ 240.

There are too many other concerns throughout the United States who also use the initials “E & J” in their businesses. See also registrations at R. 739 to 770, inclusive.

Plaintiff’s initials “E & J” have not been established to have acquired secondary meaning, and in the face of the common usage of these initials by others in their respective businesses, it is not apparent how plaintiff’s initials could acquire secondary meaning unless restricted to the specific goods manufactured and sold by the plaintiff which are radically different from those of the defendant.

Misaddressed mail is of dubious evidentiary value in attempting to establish "confusion or mistake or deceit of purchasers."

Vick Chemical Company v. Thomas Kerfoot X Co. Limited, 80 F. 2d 73, 27 USPQ 393;

Palmer v. Gulf Publishing Co., 79 Fed. Supp. 731, 78 USPQ 349, 355;

Emerson Electric Mfg. Co. v. Emerson Radio, 24 Fed. Supp. 481, 486, affirmed 105 F. 2d 908, certiorari denied, 308 U. S. 616;

Time, Inc. v. T.I.M.E. Incorporated, 102 USPQ 275, 123 Fed. Supp. 446;

Kauffman v. Matczak, 55 USPQ 238, 33 TM Rep. 18.

No one is shown to have ever purchased or received defendant's invalid wheel chairs under the confused or mistaken belief that he was acquiring goods he desired to purchase from the plaintiff. [Request for Admissions 14, 15, 16, R. 433-434.] In *Beechnut Packing v. P. Lorillard Co.*, 7 F. 2d 967 (CCA 3), the Court said:

"The only injury, real or fancied which the evidence indicates the plaintiff might sustain is that some of its customers are prejudiced against the use of tobacco and made inquiry to ascertain if it had embarked in the tobacco business, and threatened to stop dealing with it in case it had. This resulted from the similarity of trade marks on distinct and unrelated classes of merchandise. *But from confusion and injury caused by similarity of names the courts will not relieve. The defendant had a right to use its trademark if it did so reasonably and honestly. It is not the use, but dishonesty in the use that is condemned, * * *.*" (Emphasis added.)

In *Chamberlain v. Columbia Pictures*, 186 F. 2d 923, this Court said:

“Establishment of a secondary meaning is necessary in order to sustain an action for unfair competition where the goods are entirely non-competing and unrelated.”

In *Sears, Roebuck & Co. v. All States Life Insurance Co.*, 246 F. 2d 161, 114 USPQ 19 (CA 5), the Court called attention to the restrictive effect given to the certificates of registration obtained under the Lanham Act as follows:

“* * * Moreover, it may be appropriate to call attention to the restrictive effect given to the certificates of registration of the several marks of the appellant Sears because of the language of the statute itself. Section 1057(b) provides:

‘§ 1057. Certificates of registration—issuance and form. * * *

‘(b) A certificate of registration of a mark upon the principal register provided by this chapter shall be *prima facie* evidence of the validity of the registration, registrant’s ownership of the mark, and of registrant’s exclusive right to use the mark in commerce *in connection with the goods or services specified in the certificate, subject to any conditions and limitations stated therein.*’

“15 U.S.C.A. § 1057(b).

“Considering here only the narrow question whether there was infringement of Sears’ trademarks, we do not come to the question whether there were other elements of unfair competition. As to the question of infringement, the statute itself seems to distinguish between cases in which the alleged infringer uses the mark with a different product and

those in which he uses it on a competing article, for the marks as such do not carry the statutory presumptions of registrant's exclusive right to use except *as to the goods actually specified* in each certificate of registration. None of these, included insurance. They all related to articles of merchandise." (Emphasis quoted.)

Here, the effect of the appealed judgment is to require the defendant to discontinue the use of the initials "E & J" as a trademark. This in legal effect is forcing the defendant to make a legal abandonment of the mark "E-J" as applied to wheel chairs. As the plaintiff has lost no sales it is not apparent how this could benefit the plaintiff unless the plaintiff or its beneficial owner, American Hospital Supply Corporation, should embark in the wheel chair business. Plaintiff's engaging in the invalid wheel chair business is no mere unsubstantiated fear on the part of the defendant. Emery S. Beardsley, President of the plaintiff, testified in January, 1954, as follows [Defendant's Request for Admissions 63, R. 446]:

"XQ411. I just want to test your memory. Was this discussion or mention of the possibility of going into the wheel chair business in any way participated in by the officials or anybody representing American Hospital Supply Corporation?

A. The only ones present were myself and Mr. Bivens, he and I.

XQ412. Just you and Mr. Bivens discussed it?

A. We were discussing potential new products for E & J Manufacturing Co., because we have lots of room over there and we are going into more new products just as fast as we can and one of the new suggested items by Mr. Bivens was wheel chairs for invalids."

At the same time he also testified as follows [Request for Admissions 64, R. 446, 447]:

“A. I have already said that there is a difference between wheel chairs and the product that E & J Manufacturing Co. manufactures now. I am thinking of the future, the new product that E & J may want to make. Suppose we want to make wheel chairs and decide to do it.

XQ324. And suppose you call them ‘E & J’; is that it?

A. *Well, we should be able to use our own trade-mark on wheel chairs, in my opinion.* I think it is a very unethical thing for Everest & Jennings to be using ‘E & J’ since we have been using it since about 1929 as a trade-mark.

XQ325. And you contemplate going into the wheel chair business and identifying them as E & J, is that it?

A. I didn’t say that. I don’t know what the future holds further.

XQ326. Well, then, the real purpose of this proceeding is to enable you to do that if you want to do that, is that it?

A. What proceeding do you mean?

XQ327. This Opposition proceeding.

A. *I would say that is one of the purposes, yes.”*

And as follows [Request for Admission 65, R. 447]:

“The Witness: If E & J Manufacturing Co. were manufacturing wheel chairs, it would certainly want to apply its trade-mark ‘E-J’ to wheel chairs.”

Emery S. Beardsley, who gave the above testimony is

“* * * chairman of the board of Don Baxter, Inc., of Glendale, California; president and a director

of E. & J. Manufacturing Company of Burbank, California, and a director of American Hospital Supply Corporation, Evanston, Illinois.” [R. 453-454.]

As American Hospital Supply Corporation has now acquired an invalid wheel chair manufacturing company and is engaged in the manufacture and sale of invalid wheel chairs, it might continue to do so through American Hospital Supply Corporation or through E & J Manufacturing Company which it owns through Don Baxter, Inc. [Request for Admissions 19, R. 435.] If it should identify such wheel chairs by defendant’s trademark—that the Trial Court would force defendant to abandon—a most unfair situation could be created comparable to that of *J. Treager v. Gordon-Allen, Ltd.*, 71 F. 2d 766 (CA 9).

It has many times been said that the law of trademarks is only a part of the law of unfair competition.

Hanover Milling Co. v. Metcalf, 240 U. S. 403;

S. C. Johnson & Son, Inc. v. Johnson, 175 F. 2d 176, 81 USPQ 509, certiorari denied 388 U. S. 860.

As the greater (the law of unfair competition) includes the less (the law of trademarks) and the Trial Court has found the defendant guilty of no unfair competition, his finding of trademark infringement is to that extent inconsistent. Unfair competition can undoubtedly exist without trademark infringement, but we know of no case to the effect that trademark infringement can exist in the absence of unfair competition. *Aunt Jemima Mills Co. v. Rigney*, 247 Fed. 407, might appear to be that way, but in discussing the case in *S. C. Johnson & Son Inc.*

v. Johnson, supra, the law of registered trademarks was stated to merely have been extended to

“* * * make the protection of the new right coextensive with the law of unfair competition as it was in 1946 * * *.”

While it is true that there is a sales area of products of plaintiff and defendant which are common to both parties as found by the Court in Finding 15 [R. 29], to wit, hospitals and institutions, it should be borne in mind that sales of the plaintiff's products are made only after the most discriminating scrutiny by intelligent doctors. [R. 135.] These people who have the power of accepting or rejecting plaintiff's apparatus certainly possess an equal power of discerning that defendant's wheel chairs do not come from the same source as plaintiff's resuscitators and oxygenators.

We think the Trial Court definitely exceeded its authority and abused its equitable discretion not only in enjoining the defendant from continued use of the trademark “E-J” or “E & J” but in also requiring the defendant to

“* * * immediately circularize to his (its) present customer list and advise them of what other name it intends to use in the marketing of its products and state that it is withdrawing from use the trade-mark ‘E-J.’” [R. 32.]

There is no requirement in law that a manufacturer or seller of merchandise use any trademark whatsoever. Furthermore, it is a matter of common knowledge that the selection and adoption of a trademark frequently

requires thought, search to determine availability, and other considerations involving time. To require the defendant to

“* * * *immediately* circularize his present customer list and advise them of what other name it intends to use in the marketing of its products
* * *”

not only exceeds the authority of the Court, but is an abuse of its equitable discretion.

Conclusion.

Here, the defendant is in no way endeavoring to gain any benefit at the expense of the plaintiff. It is attempting to sell its own goods honestly and fairly under its own name which unfortunately has the same initials as those of the plaintiff and a multitude of other concerns scattered throughout the country. As it is easier to refer to the defendant by its initials rather than by its full corporate name, mistakes have occurred and may occur in the future. These mistakes may continue to occur for this reason, even should the defendant discontinue its use of “E-J” as its trademark because of the common usage of the term in the trade. The trade cannot be enjoined from continuing to refer to the defendant and its products by the term “E-J” or “E & J.” These mistakes are of no advantage to the defendant and should be regarded as one of the inherent penalties involved in the plaintiff’s selection of a weak and commonly used mark.

It is respectfully urged that the District Court should be reversed as to its holding of trademark infringement. It should further be held that the defendant not only has the right to use its own name but also initials and abbreviations thereof by which it is popularly known. Consequently, it is urged that it be held that the defendant is entitled to use "E-J" on its products and to register the same in the United States Patent Office as applied thereto.

Respectfully submitted,

FRED H. MILLER,

ALLAN D. MOCKABEE,

By FRED H. MILLER,

Attorneys for Everest & Jennings, Inc.



APPENDIX.

LIST OF EXHIBITS.

Plaintiff's Exhibit No.	Identified	Offered and Received or Rejected
1	37	37
2		
3		
4	44	46
5	47	48
6	44	46
7	48	49
8	49	50
9	53	53
10	56	56
11	57	57
12	60	60
13	61	61
14	62	63
15	64	64
16	64	64
17	52	52
18	69	69
19	69	69
20	59	
21		
22		
23		
24		
25	73	73
26	74	74
27	75	75
28	75	75
29	75	75
30	77	77
31	84	85
32	84	84
33	83	84
34	83	83
35	82	82

Plaintiff's Exhibit No.	Identified	Offered and Received or Rejected
36	85	85
37	85	86
38	86	87
39	87	90
40	101	102
41	96	97
42	100	100
43	100	100
44	100	100
45	100	100
46	105	105
47	111	111
47-A	147	147
47-B	465	466
47-C	465	466
48	203	
49	226	228
50	226	228
51	235	253
52	235	253
53	235	254
54	235	254
55	251	254
56	254	256
57	258	477
58	262	264
59	262	264
60	264	264
61	310	477
62	282	358
63	282	477

Exhibit No. Plaintiff's	Identified	Received or Rejected Offered and
64	282	283
65	283	358
66	284	284
67	284	358
68	284	285
69	285	358
70	285	286
71	290	292
72	295	295
73	324	324
74	417	417
75	418	418
76	419	419

Defendant's Exhibits	Identified	Offered and Received or Rejected
A	188	400
B	358	358
C	358	359
D	359	359
E	387	387
F	390	391
G	394	394
H	394	394
I	397	397
J	400	403
K	403	404
L	403	404
M	421	428
N	427	428
O	452	452
P	452	453

No. 15922
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

EVEREST & JENNINGS, INC., a corporation,
Appellant,
vs.

E & J MANUFACTURING COMPANY, a corporation,
Appellee.

E & J MANUFACTURING COMPANY, a corporation,
Appellant,
vs.

EVEREST & JENNINGS, a corporation,
Appellee.

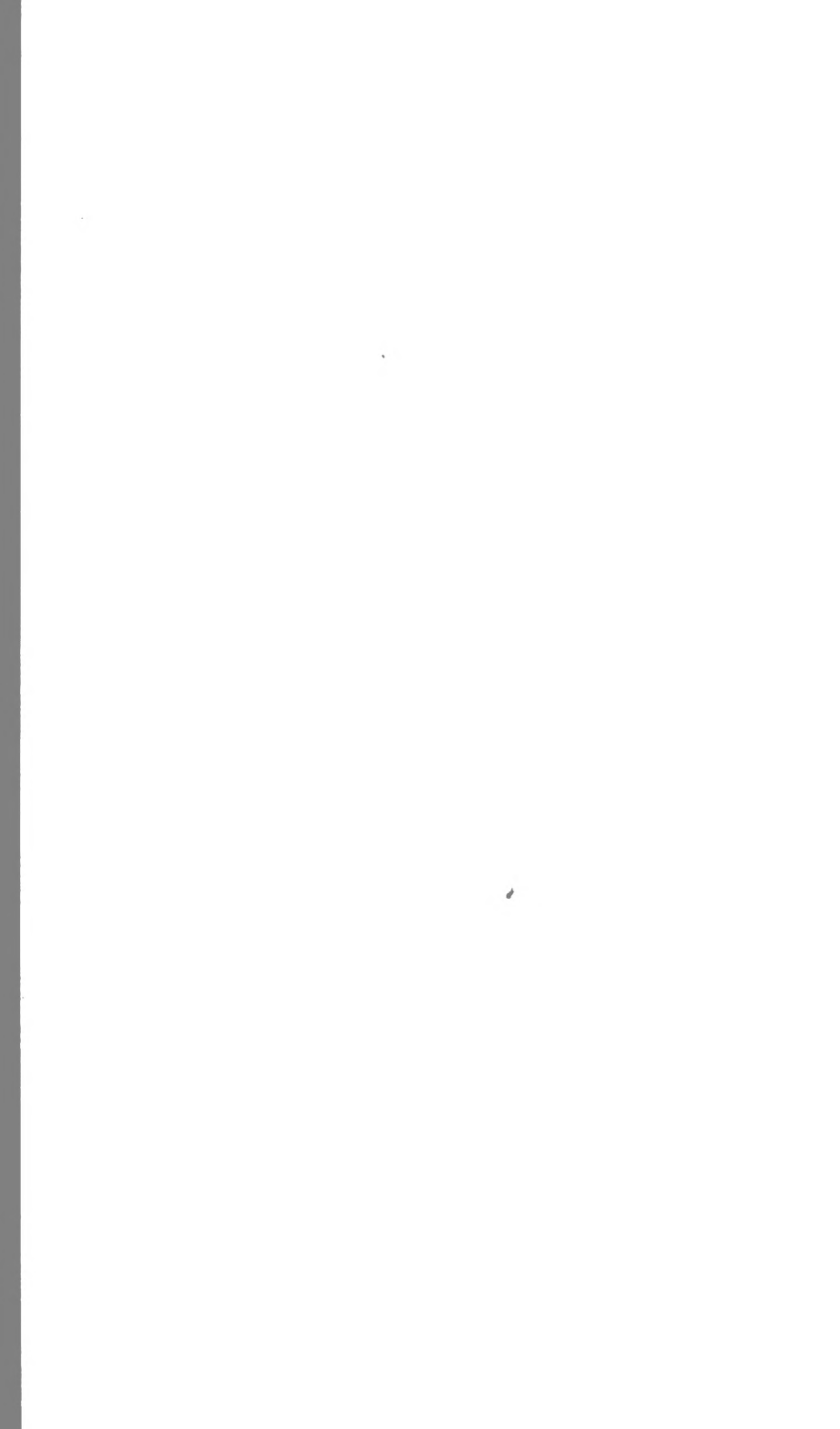
OPENING BRIEF FOR APPELLEE CROSS-
APPELLANT, E & J MANUFACTURING
COMPANY.

LYON & LYON,
By FREDERICK W. LYON,
811 West Seventh Street,
Los Angeles 17, California,
Attorneys for Appellee.

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EVEREST & JENNINGS, a corporation,
Appellee.

**OPENING BRIEF FOR APPELLEE CROSS-
APPELLANT, E & J MANUFACTURING
COMPANY.**

This case comes before this Court upon the appeal of the defendant from the final judgment of the United States District Court for the Southern District of California which adjudged that plaintiff was the owner of the trademark "E & J", registered in the United States Patent Office, Serial No. 439,924, of July 27, 1948, and that the trademark was good and valid in law and was infringed by the use of the trademark "E-J" by the defendant, and enjoined the appellant from further infringement of said trademark.

The District Court further held that the infringement of said trademark was done without intent to infringe,

and that there was no contract between the parties and that no damages should be awarded to plaintiff. From these last three rulings of the District Court, the plaintiff cross-appealed.

Appellee-cross-appellant filed an action in the District Court alleging, ownership of the trademark "E & J", registration of said trademark in the United States Patent Office, that the defendant-appellant was infringing said trademark, that as a second cause of action for unfair competition, that the defendant had made a contract with the plaintiff to stop the use of the trademark "E-J", that the defendant complied with the contract for a period of two years and without the consent of the plaintiff, resumed the use of the trademark "E-J" in violation of said contract.

Jurisdiction.

Jurisdiction of the District Court and of this Court to hear this appeal is clear. The appeal of both defendant and plaintiff was timely. The final judgment was entered on January 10, 1958; the notice of appeal of the defendant was filed February 6, 1958; and the notice of appeal of the plaintiff was filed on February 7, 1958, both appeals being filed less than 30 days after the entry of the final judgment.

Jurisdiction of the Trial Court is conferred by 28 U. S. C. 1338, 15 U. S. C. 1121 and 28 U. S. C. 1338(b). The appellate jurisdiction of this Court is obtained by 28 U. S. C. 1291 and 15 U. S. C. 1121.

Statement of the Case.

Plaintiff-appellee, E & J Manufacturing Company is a California corporation which has manufactured and sold resuscitators and other gas administering devices under

the trademark “E & J” from its inception in 1945 and through its predecessors in interest since 1929 to the date of this action. [Find. of Fact, 4, R. 27.]

The trademark was registered in the United States Patent Office on July 27, 1948, Serial No. 439,924. [Ex. 1, R. 706; Find. of Fact 12, R. 29.]

Plaintiff has become widely known as a manufacturer of resuscitators and gas administration devices throughout the United States and especially widely known in the hospital supply field and the trademark “E & J” has become widely known and respected in the hospital supply field as designating the products of the plaintiff. [Find. of Fact 6 and 7, R. 28.]

The defendant, Everest & Jennings, Inc., is and was a manufacturer of wheel chairs. In 1946 the acts of the defendant brought on the present controversy in that the defendant began to market its wheel chairs with the trademark “E-J” applied thereto. They widely advertised under this trademark “E-J”. The defendant sold its wheel chairs to the same trade (the hospital supply trade) as plaintiff sold its resuscitators. [Find. of Fact 15, R. 29.]

The District Court found that “E & J” and “E-J” were substantially identical to each other. [Find. of Fact, 14, R. 29.] In fact, the defendant has not raised in the lower court and does not in its opening brief suggest that there is any difference between these two marks. For this reason during the balance of this brief, the trademark in controversy will be stated as “E & J” in any reference and will be intended to mean either alternative.

At the trial, a great quantity of evidence was submitted to the District Court, including documents and oral testimony that the use of “E & J” by the defendant had resulted in *actual* confusion as to the source of origin

of the defendant's goods. After hearing this testimony, examining the witness, the District Court made a Finding of Fact:

"The use of the trade-mark 'E-J' by defendant on wheel chairs has resulted in actual confusion to customers as to the origin of the goods sold with the trade-mark 'E-J' applied thereon. The original mark 'Everest & Jennings' did not cause any confusion." [Find. of Fact 11, R. 29.]

The plaintiff in this case has never relied upon any *supposition* that there was only likelihood of confusion, but on the *proof of actual confusion*. This Court does not have to speculate as to whether the infringement in this case would be ". . . likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services." (15 U. S. C. 114(1).) Plaintiff herein has relied entirely on the proof that there was *actual* confusion as to the source of origin and not merely that it was likely to happen. This the District Court found as a fact. [R. 29.] This is a true finding of fact and not a conclusion of law, and should, therefore, not be disturbed on appeal.

See:

F. R. C. P., Sec. 52(b);

Grace Bros. v. Commissioner of Internal Revenue,
173 F. 2d 170;

Pointer v. Six Wheel Corporation, 177 F. 2d 153.

A further finding of fact of the District Court was that the area of sales of the products of both plaintiff and defendant were in a large part common to both parties, and for this reason there was confusion as to origin of the goods bearing the trademark "E & J". [Find. of Fact 15, R. 29.]

At the trial, defendant offered considerable evidence that others used the trademark "E & J" in the United States and that this showed that the mark had not acquired any secondary meaning. Defendant could not show the use of this mark by any other concern in the hospital supply business. Defendant was unable to show any confusion between the plaintiff's goods and those of any other manufacturer, and all witnesses questioned on this point denied that there had been any confusion with other user's of "E & J" either as a trademark or a business name.

The defendant, not the plaintiff, first recognized this confusion as to the source of origin of the goods of the two parties, and the defendant's president, Everest, called the plaintiff and arranged a conference [R. 91] with Stanton, the Vice-president and General Manager of plaintiff. [R. 38.] At this conference Everest, defendant's President, acknowledged that there was confusion [R. 364, 365, 91-94, 98-99] as to the origin of the goods of the two parties and agreed that something had to be done.

The defendant again acknowledged this confusion in writing [Ex. 40, R. 707] and assured the plaintiff that the defendant would "eliminate the letters 'E & J' from their advertising and correspondence". A meeting was held between the presidents of plaintiff and defendant, Beardsley and Everest, respectively, along with Stanton and Dunn, the latter being the General Manager of the defendant, at the office of the plaintiff where again it was asserted that the defendant would cease the use of the trademark "E & J" because of the confusion resulting in the defendant's use of the mark. [R. 102-103, 366-367, 455-456, 461-467, 382, 384.]

After this meeting with the plaintiff, the defendant ceased the use of the trademark "E & J" in all adver-

tising and promotional literature [R. 103, 384] until December 1952 [R. 386] a period slightly in excess of three years. During this period of time, there were no further incidents of confusion as to the origin of the two companies' goods, except for a minute number of orders which were sent to the wrong company. [R. 205, 206, 385.] In 1953, after the resumption of the use of the trademark "E & J" by the defendant, [R. 386] the confusion as to the origin of the goods again became great. [Ex. 61, R. 721-722; Ex. 64, R. 723; Ex. 66, R. 724-727; Ex. 68, R. 728-730.]

Questions Involved on Defendant's Appeal.

The questions raised and briefed by defendant- appellant on its appeal are:

1. That a defendant has the right to use his own surname on products that it manufactures and sells as long as it does so fairly and honestly. With this argument the plaintiff-appellee has no quarrel and agrees. (See Find. of Fact 11 [R. 29] where the District Court found that no confusion resulted from the use by defendant of its name "Everest & Jennings".)

2. That a party has the right to use an arbitrary trademark such as the trademark "E & J" if it happens to be the initials of the party or a nickname for the party, without regard to any injury that he may cause a prior user in the same field. With this contention plaintiff-appellee thoroughly disagrees.

3. That because the goods of the respective parties are dissimilar, regardless to whom those goods are sold, there cannot be confusion as to origin by use of the same trademark thereon. With this contention plaintiff-appellee thoroughly disagrees.

ARGUMENT.

The District Court found as a matter of fact, after listening to oral and documentary evidence, that plaintiff was a manufacturer of resuscitators and other gas anesthetic machines [Find. of Fact 4, R. 27] and used thereon the trademark "E & J", and that the plaintiff's products had become widely known and respected in the hospital supply field under the trademark "E & J". [Find. of Fact 6 and 7, R. 28.] The Court found that the plaintiff had been using this trademark for many years prior to any use of the trademark by the defendant. [Find. of Fact 4 and 8, R. 27, 28.] The Court found that after long use by the plaintiff, the trademark "E & J" had become widely respected and known in the hospital field. The Court found that defendant began to use the trademark "E & J" on wheel chairs which were sold to the customers of plaintiff. [Find. of Fact 15, R. 29-30.] The Court found that because of the widely known and respected use of the trademark "E & J" by the plaintiff, that the use by the defendant resulted in *actual* confusion amongst the customers of both plaintiff and defendant as to who manufactured which article. [Find. of Fact 11, 13, R. 29.] After making these findings, the District Court enjoined the further use of the trademark "E & J" in the sale of wheel chairs, as such use constituted infringement of the plaintiff's registered trademark. [Conclusions of Law 4 and 5, R. 30-31.] The only reason given by the defendant that this is error on the part of the District Court is that a party should be allowed to use the initials or nickname which apply to the name of his concern.

The laws protecting the use of trademarks should be strictly observed by the Courts as they were adopted

originally by the Courts by the equitable branch thereof to protect the public from being misled as to the source or origin of goods bearing trademarks thereon. This common law doctrine was not adopted to protect specifically the manufacturer who used a trademark or his right to the exclusive use of the trademark, but to protect the public from being misled. (*American Distilling Co. v. Bellows*, 102 Cal. App. 2d 8, 25.) This law has now been codified in the so-called Lanham Act 15 U. S. C. A. Chapter 22, and it provides stringent remedies both by injunctive actions and damages to prevent the misleading of the public as to the source of origin of the goods when a recognized trademark has been applied thereto. (15 U. S. C. 1114(1); 15 U. S. C. 1117.)

In the present case, the arbitrary designation or trademark "E & J" was first applied to resuscitators and anesthetic gas machines in the hospital field in 1929, and became widely known in this field. In fact, being the only user of the mark in this field, it became synonymous with the E & J Manufacturing Company, plaintiff. Seventeen years later, the defendant entered the hospital supply field and used and is using the mark "E & J" on his product. Immediately thereafter, actual confusion resulted in the minds of purchasers of both companies' products as to who manufactured which products.

All of these facts as set forth before have been found as Findings of Fact by the District Court. These findings are amply supported. This evidence which briefly summarized, comprises five different types of evidence.

1. The oral statements of the President of the defendant that such confusion as to the source of origin had resulting by the dual use of the trademark "E & J".

2. The written acknowledgement of the General Manager of the defendant as to the confusion which was given with the approval of defendant's President.

3. The oral testimony of the officers and employees of the plaintiff, as well as other independent witnesses.

4. Evidence such as mistakes by publishers, convention managers, etc., as to the source of manufacture; and

5. Last and not least a great quantity of misdirected mail (orders and inquiries for parts and machines and payment of bills). This misdirected mail resulted immediately upon and not prior to the use of the trademark "E & J" by the defendant. This misdirected mail substantially ceased during the three-year period in which the defendant ceased the use of the trademark "E & J" in its advertising and promotional endeavors. The volume of this mail immediately became large in volume after the defendant again began to use the trademark "E & J".

Defendant's Admission of Confusion.

In the opening brief of the defendant-appellant, the first two of these evidentiary items to sustain the District Court's Findings of Fact as to confusion of source of origin was conveniently overlooked. Defendant-appellant only argues the validity of the other types of evidence.

The testimony presented orally before the District Court with the exception of that of the deposition taken by the defendant of its former president, Everest, is as follows:

That an article was published in the "Hospital Progress" magazine, giving credit to the defendant for the invention and development of a resuscinette which was an infant combination resuscitator and incubator. That this article falsely attributed this development to the de-

fendant, when in fact it had been made by the plaintiff. Just above this article appeared the ad of the defendant for its wheel chairs and incorporated thereon the trademark "E & J". [Ex. 39, R. 90-93.]

At the same time, there had been growing confusion between customers of the companies because of the use of the trademark "E & J" by the defendant, and that therefore the president, Everest, of the defendant called the general manager of the plaintiff, Stanton, and acknowledged this confusion and invited the general manager of the plaintiff to a conference concerning the matter. [R. 91-94.] That a conference was held between the general manager of the plaintiff, the president of the defendant and its general manager, Dunn [R. 97-98, 364], at which time the president of the defendant admitted that considerable confusion had been created by the defendant's use of the trademark "E & J" [R. 363-367] and at the time of this conference Stanton stated that he would have to take legal action unless the situation was remedied [R. 98-380], and that if the defendant would stop the use of the trademark "E & J", he would not bring litigation. [R. 380.]

Both Everest, the president, and Dunn, the general manager of the defendant, admitted this [R. 380, 365], and admitted that they accepted the proposition of Stanton [R. 366-367, 381], and agreed to cease the use of the trademark "E & J" in advertising and correspondence [Ex. 40, R. 707, 381], and accepted an invitation to meet and further discuss the matter with Beardsley, the president of plaintiff. Dunn, at the orders and instructions of Everest, defendant's president, drew up and signed the letter, Exhibit 40 [R. 381], which acknowledges therein the confusion and accepted Stanton's agreement to cease

the use of the trademark in advertising and correspondence and to further cooperate in any way to clear up the confusion.

A second meeting [R. 102, 382] was held in which Beardsley and Stanton, for the plaintiff, and Everest and Dunn, for the defendant, were present, which opened on a friendly term. Beardsley thanked them for their agreement and offer to cooperate [R. 455], and this second meeting adjourned with the same understanding. [R. 102, 382, 455.]

There is no dispute anywhere in the record but that the defendant agreed at this time that there was confusion in the minds of the purchasing public as to who manufactured the articles being sold under the trademark "E & J", and this was deleterious to the best interests of the plaintiff and that it should cease.

These admissions against interest of the defendant and its action to rectify the damage to plaintiff are, alone, sufficient to support the District Court's findings as to confusion and infringement. These admissions are emphasized by the fact that defendant did cease in conformance with Exhibit 40, the use of the mark "E & J" from late in 1949 until the first of 1953. [R. 386.]

Oral Testimony as to Confusion in the Hospital Supply Trade.

The District Court's findings of fact as to confusion and infringement is further substantiated by the oral testimony of the following witnesses, Armstrong, Williams, Garrett, Healy, Acker, Vollaro, Dirmann, Hallamore, Miller and Pohlmann, as well as the previously referred to testimony of the defendant's president and general manager and the plaintiff's president and general

manager. This evidence shows without dispute that purchasers in the hospital supply trade, after the infringement by the defendant, were continuously mistaking the plaintiff and defendant corporations as to whom sold what product. Salesmen of the plaintiff corporation were turned away and refused interviews with prospective customers—the prospective company had already talked to the E & J salesman.

A specific incident out of many in the testimony is the incident covering the loss of any possible sales to the John B. Garrett Company of Troy, New York. A representative of the defendant had called upon this company and had taken up considerable of the Garrett Company's time. A representative of the plaintiff called to try and sell the plaintiff's products and was immediately informed that he had already seen the E & J representative and could spare him no further time and that he was not interested. As a result of this, the John B. Garrett Company purchased resuscitators from another company. [R. 554-558.]

Later at a convention of the hospital supply trade, and through no instigation of the plaintiff, Mr. Garrett, Jr., of the John B. Garrett Company approached the booth of the plaintiff and there confirmed the fact that he was confused and mistaken as to the companies that were selling wheel chairs and resuscitators. [R. 557-558.] This confusion in the mind of Mr. Garrett was confirmed by the testimony of plaintiff's representatives, John B. Williams, Jr., [R. 520-523] and Charles J. Vollaro. [R. 567-572.]

Another example out of many is the testimony of Dirmann and Miller. They made a trip selling hospital supplies to the Good Samaritan Hospital in Phoenix, Ari-

zona. Mr. Miller was a salesman for the Walters Modern Surgical Company, a dealer in hospital supplies. When admitted to the office of the purchasing agent for the hospital and introduced as the “E & J man” by Mr. Miller, the hospital purchaser was angry, and he said “Well, Jesus, Miller, we don’t want any wheel chairs. What did you bring the E & J man for”. [R. 312-313.] This testimony of Mr. Dirmann was supported by that of Mr. Miller. [R. 242-245.]

Similar incidents are recited by all of the aforesaid witnesses, including Pohlmann, Hallamore, Healy and Acker. It is impossible to set forth all of the incidents testified to by these various gentlemen. It is needless to say that there was no contrary evidence offered by the defendant. The Court heard many of these witnesses and saw them on the stand, and obviously believed their stories and their testimonies. With the admissions of the defendants, this testimony further supports the Findings of Fact of the District Court that there was confusion and infringement occasioned by the use of the trademark “E & J” by the defendant in the hospital supply field.

Mistakes of Publishers and Convention Managers.

To further illustrate the many forms of testimony in this case which led the Court to believe that there was actual confusion in the minds of the hospital supply trade as to whom manufactured what products, the evidence includes “Hospital Progress”, a magazine published by the Catholic Hospital Association of the United States [R. 86-90] which includes an article describing a new device called a resuscinettes which is a combined resuscitator and incubator for infants. The magazine credited this new device to the defendant, whereas it actually was a product

of plaintiff. The defendant tries to overcome this evidence by claiming there is no proof of who occasioned the publication of the article. Defendant does not claim that the plaintiff instigated the publication of the article. The fact is, and the only one pertinent to this case, that the article was published, adding to the confusion of the purchasing public and the hospital supply trade as to whom manufactured what products. Besides erroneously crediting the defendant with this new device, the magazine printed the advertisement of the defendant carrying the trademark "E & J" on the same page. [Ex. 39, a physical exhibit, R. 90.]

Convention operators in whose conventions the plaintiff and/or defendant exhibit, were under similar errors as to whom manufactured what and addressed their allocations of space to the wrong party. [R. 319-324.] Other parties were so confused as to the source of the goods that they were purchasing and receiving, that they paid the wrong party. [R. 290.] Other dealers even added to this confusion by incorporating a resuscitator and wheel chair in the same advertisement and labeling themselves as "E & J distributors". [Ex. 75, R. 417-418.] Other magazines published the ads of one of the companies using the trademark "E & J" and in the index of advertisers credited the advertisement to the wrong company. [Ex. 76, R. 419.] This is all cumulative proof as to the correctness of the District Court's findings that in the hospital field the acts of the defendant in using the term "E & J" had led to actual confusion as to the source of origin of the goods.

Misdirected Mail.

The last and least proof of the confusion as to the source of origin of the goods sold under the trademark "E & J" is the misdirected mail, a great quantity of which, though not all of this mail, was introduced in evidence. The Record shows that from 1946, when the defendant began using the trademark "E & J", until 1949, when he agreed to and did stop the advertising with the "E & J" trademark included, both companies secured a large quantity of orders of the other company. [R. 98, 105-106, 364-365.]

The plaintiff-appellee herein agrees and does not quarrel with the cases set forth by the defendant-appellant that misdirected mail is not proof of confusion. However, in this case we have an added factor, which along with the other proof already referred to, makes this evidence pertinent. The defendant ceased to advertise and promote the trademark "E & J" in 1949. [R. 103, 384.] At that time, the quantity of misdirected mail was large. Until 1953 no advertising was done with the trademark "E & J" by the defendant, and this misdirected mail substantially ceased. [R. 205-206, 388.] The defendant began again to use the trademark "E & J" in 1953 [R. 386], the result was an immediate increase to large proportions of this misdirected mail. These facts are undisputed in the Record. [Ex. 61, R. 721-722; Ex. 64, R. 723; Ex. 66, R. 724-727; Ex. 68, R. 728-730.]

There is only one possible presumption from these facts and that is that the use in the advertising and promotional literature by the defendant of the trademark "E & J" was leading the hospital supply trade into belief that wheel chairs and resuscitators were both manufactured by the same concern.

Taken altogether the evidence is not only sufficient to support the District Court's findings of confusion as to source of origin and infringement, but is overwhelming.

Plaintiff-Appellee's Trademark Is Entitled to Protection.

Defendant-appellant argues that irrespective of the confusion as to source of origin of the goods occasioned by the defendant's use of the trademark "E & J", nevertheless the Court should not grant an injunction against this use. This argument is based on the proposition that defendant is using nothing more nor less than the initials of its corporate existence. Defendant in making this argument ignores the fact found by the District Court that in the hospital supply field the trademark "E & J" had become a mark which distinguished the plaintiff's goods from those of others. [Find. of Fact 6 and 7, R. 28.]

This finding of the District Court is amply supported by the evidence which will be summarized hereinafter. This finding of fact removes the plaintiff's trademark from the classification of weak or strong marks as found by this Court in the *Sunbeam* cases (*Sunbeam Furniture Corp. v. Sunbeam Corp.*, 191 F. 2d 141; *Sunbeam Lighting Co. v. Sunbeam Corp.*, 183 F. 2d 969) and makes this mark a strong mark entitled to all the protection which a Court should grant to any completely fanciful mark. The Supreme Court has said that it will give all protection to a trademark even though that mark is completely descriptive if the mark "Has acquired the meaning of respondent and respondent's products only, and is a mark which distinguishes respondent's goods from others of the same class . . .". (*Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U. S. 315 at 322.)

In the present case, the Court found [Find. of Fact 6 and 7, R. 28] that the trademark "E & J" in the hospital supply trade had become widely known and respected as designating the products of the plaintiff. When the defendant invaded this field with the same trademark, immediate confusion as to the source of origin occurred. This Court has held in *Sunbeam Furniture Corporation v. Sunbeam Corporation*, 191 F. 2d 141, 144, that where the products were in the same field (portable fluorescent lights against electrical kitchen gadgets, both of which were sold to the same purchasers) that even a weak mark would be sustained against an infringer.

In the present case, both plaintiff's and defendant's goods are sold to the same purchasing agents (hospital supply companies and hospitals themselves). This case is governed by the *Sunbeam Furniture* case, *supra*, and distinguished completely from the case of *Sunbeam Lighting Corp. v. Sunbeam Corp.*, 183 F. 2d 969, wherein the Court held that fluorescent overhead lights could not be confused with kitchen gadgets because the kitchen gadgets were sold to the ordinary housewife, while the fluorescent lights were sold to contractors and builders. This Court made the same distinction in the two *Sunbeam* cases that the plaintiff-appellee makes herein. That is, in the case where the injunction was not granted, the goods were sold to different classes of purchasers. In the second *Sunbeam* case this Court held that an injunction was proper as the goods were sold to the same class of purchasers.

In the present litigation the facts are undisputable that the purchasers of both plaintiff's and defendant's goods, in a large part, are the same (hospital supply companies and hospitals) and the District Court so found. [Find. of Fact 14 and 15, R. 29.]

The Trademark "E & J" Has Become Distinctive in the Hospital Supply Trade.

The plaintiff-appellee's trademark "E & J" has become distinctive in the hospital supply trade as distinguishing the plaintiff's goods from those of others. [Find. of Fact 6 and 7, R. 28.] The plaintiff's resuscitator was the first successful machine for artificial resuscitation. [R. 69.] A resuscitator is a device used for reviving people who have become unable to breathe and would therefore die without some type of artificial respiration. [R. 39.] Plaintiff pioneered this field and has been eminently successful. [R. 69.] All of this evidence is undisputed.

Plaintiff's resuscitators have been given national recognition under their trademark "E & J", even to the extent that they have been written about and described in magazine articles issued to the general public. [Exs. 25-26; R. 70, 73-74.] More important is the fact that many articles have been written by the medical profession about these devices in which credit was given to "E & J". These comprise medical and hospital journals. These articles describe the advantages and operation of the "E & J" resuscitator to the practitioner in the medical field. [Exs. 27-30; R. 74-82.] In fact, it has made the name "E & J" the best known trademark in this field. [R. 69.] When a trademark has secured such recognition, it will be protected. As the Supreme Court has said,

"The right arises not from the trade-mark acts but from the fact that 'Nu-Enamel' has come to indicate that the goods in connection with which it is used are the goods manufactured by the respondent. When a name is endowed with this quality, it becomes a mark, entitled to protection."

Armstrong Paint & V. Works v. Nu-Enamel Corp., 305 U. S. 315 at 336.

Though plaintiff and defendant are not directly competitive in that they sell different goods, the District Court found that these goods were sold to the same purchasers and that the use of the trademark had resulted in confusion as to the source of origin of the goods. It therefore properly made the conclusion of law that the use of the trademark "E & J" was an infringement of the plaintiff's registered trademark "E & J".

This Court in *Sunbeam Furniture Corp. v. Sunbeam Corp.*, 191 F. 2d 141 at 144, said

"Reliance is placed not upon competition with plaintiff's products but upon the likelihood of confusion of source. The Illinois corporation has a legitimate interest in seeking to protect its goodwill and the reputation of its mark. *Hanover Star Milling Co. v. Metcalf*, 1916, 240 U. S. 403, 36 S. Ct. 357, 60 L. Ed. 713, achieved only after considerable expenditure of effort in marketing a dependable product. The interests of shoppers in their reliance upon brand names or marks must also be taken into consideration. *Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co.*, 1942, 316 U. S. 203, 62 S. Ct. 1022, 86 L. Ed. 1381, rehearing denied 316 U. S. 712, 62 S. Ct. 1287, 86 L. Ed. 1777."

Cross-Appeal of Plaintiff Appellant.

Plaintiff-Appellant's Specification of Errors.

The plaintiff has cross-appealed from the decision of the District Court in this case [R. 34] and has made the following specification of errors [R. 696-698]:

1.

The District Court erred in holding that there was no contract binding the defendant to cease and desist from the further use of the trademark "E & J". [Find. of Fact 16, R. 30.]

2.

The District Court erred in holding the defendant's use of the trademark "E & J" does not constitute deliberate palming off of their goods as those of plaintiff. [Find. of Fact 17, R. 30.]

3.

The District Court erred in holding that the appellant had not made out a case for damages. [Conclusions of Law 6, R. 31.]

4.

The District Court erred in holding that the plaintiff had failed to prove its second cause of action. [Conclusions of Law 7, R. 31.]

5.

The District Court erred in dismissing appellant's second cause of action. [R. 32.]

6.

The District Court erred in failing to hold that there was an agreement; that appellee, Everest & Jennings, Inc., had agreed in 1949 to cease and desist from further infringement of appellant's, E & J Manufacturing Company, trademark "E & J". [Find. of Fact 16, R. 30.]

7.

The District Court erred in failing to hold that when defendant, Everest & Jennings, Inc., resumed use of the trademark "E & J" in 1953, that this was done with the intent of trading upon the good will of plaintiff, E & J Manufacturing Company.

8.

The District Court erred in failing to hold that when the defendant, Everest & Jennings, Inc., resumed the use of the trademark "E & J" that it well knew that such use would lead to confusion as to origin of its goods with those of plaintiff, E & J Manufacturing Company and that such an act would cause damage to the E & J Manufacturing Company.

Summary of Argument.

1. The plaintiff and defendant entered into a contract in 1949 binding the defendant to cease and desist in the further use of the trademark "E & J".

2. That the infringement of the plaintiff's trademark "E & J" was willful and intentional and therefore plaintiff is entitled to damages.

The Contract Between Plaintiff and Defendant.

Though the District Court made a finding of fact that there was no enforceable contract or agreement between the parties hereto, this is not a proper finding of fact, but a conclusion of law, as the facts are not in dispute. The interpretation of these facts is a conclusion of law.

The plaintiff and defendant entered into an agreement which was fully defined and agreed to. In 1949, the defendant's use of the trademark "E & J" had caused confusion amongst purchasers of the products of the two

parties. This was admitted by the defendant as well as asserted by the plaintiff. [Ex. 40, R. 707.] The result of this confusion was that *defendant's* president contacted the plaintiff's general manager [R. 91-94] and a meeting was held between the two in which the plaintiff's general manager admittedly threatened to bring legal action unless the use of "E & J" ceased in defendant's advertising. [R. 365.] The defendant agreed to this. [R. 366-367, 381.] This was admitted by the former president of defendant. [R. 366-367.] This agreement is proved by the writing of Exhibit 40. [R. 707, 738.]

In this writing [Ex. 40], written by the general manager of the defendant and under the direction of the president of defendant [R. 381], defendant recognized the damage being inflicted upon the plaintiff by the use of "E & J" as a trademark by the defendant and agreed to stop using the trademark "E & J" in advertising and correspondence. A subsequent meeting after the issuance of this document and contemplated by it was held between the two general managers and the two presidents of the respective parties, at which the agreement [Ex. 40] was further acknowledged.

We have, therefore, an offer by the plaintiff that if the defendant stopped the use of the trademark "E & J" the plaintiff would not bring litigation. We have the acceptance of this offer by the president of the defendant, not only orally, but in writing. [Ex. 40.] To further confirm that a contract was made, if the Court cannot accept that procedure as constituting a valid contract, we have the action of the defendant in the face of the threat of litigation offering in writing to cease the use of the mark in advertising and correspondence, and the implica-

tion in that offer is, that if they do, the plaintiff will not bring suit.

After the issuance of this written offer, the meeting was held between the parties and the very first thing that happened at the meeting was the acceptance of the written offer by Beardsley, president of the plaintiff, when he thanked them for the offer and accepted the same.

“The letter which I had received, signed by Mr. Dunn, and I thanked Mr. Dunn for the letter and also for the co-operation which the letter said we would receive from Everest & Jennings.

“There was a discussion about the confusion that had been caused since Everest & Jennings began to use E & J.” [R. 455.]

We have in this case an offer and acceptance in either of two manners, either of which constitutes a binding contract. These facts are not in dispute and it is not possible to deny that the parties made the agreement that the defendant would cease the use of the trademark “E & J” Actually, both parties recognized the effectiveness of this contract. The defendant did cease the use of the trademark “E & J” from late Fall of 1949 to December, 1952 or January, 1953. Plaintiff did not bring action for infringement. This was an agreement made by businessmen in the ordinary conduct of their business without the presence of lawyers. Both parties believed that the agreement settled their dispute.

There was a complete meeting of the minds of both parties. Plaintiff would not sue. Defendant would cease the use of “E & J” in advertising and correspondence. The offer was made by defendant, and accepted by plaintiff. Plaintiff’s promise to forbear from suit is proven by

his actual forbearance. In *Dillon v. Lineker*, 266 Fed. 688, at 690, this Court said:

“It was not necessary that Norvena Lineker should have made a promise to forbear. Actual forbearance, without a promise to forbear, is sufficient, if such forbearance is at the request of the promisor and in reliance upon his promise.”

See also:

First National Bank v. Cecil, 23 Ore. 58, 31 Pac. 61; and

Snyder v. Roberts, 45 Wash. 2d 865, 278 P. 2d 348, at 352.

All of the conferences between the two parties constituted one transaction. The plaintiff made an offer to the defendant that unless defendant ceased the use of “E & J”, the plaintiff would bring litigation to enforce its demand. Defendant answered this offer with an acceptance—it would stop using “E & J” in its advertising and correspondence and cooperate to clear up further confusion. [Ex. 40.] This constitutes either an acceptance of plaintiff’s original offer, or a counter-offer, which counter-offer could only be that if you won’t sue, we will cease the use of “E & J” in advertising and correspondence. This counter-offer was definitely accepted by Beardsley. [R. 455.]

These facts are admitted by all parties. If the letter [Ex. 40] did not constitute an acceptance of the original offer of settlement by the plaintiff, then it must be construed to be a counter-offer and contain therein the implied agreement that the plaintiff would bring no action. This counter-offer and implied agreement was definitely accepted by the plaintiff. Under no theory of contract

law would there be any possible interpretation that both parties, at the end of the conference between the two presidents and two general managers, did not believe and consider themselves bound by the offers, counter-offers, acceptance and counter-acceptance of the two parties. A binding contract was made and is enforceable by this Court.

Defendant's Infringement Was Willful and Intentional and Plaintiff Is Entitled to Damages.

The defendant agreed that it would not use the trademark "E & J" in the face of threat of litigation by plaintiff. It acknowledged that its use had resulted in confusion as to the source of origin of the goods it sold. The defendant honored this agreement for three years. It did so until there was a change of management—Everest was no longer president of defendant. Defendant again resorted to infringement, which immediately resulted in large confusion as to the source of origin of the goods of the two companies. This was a violation of the agreement between the parties. It was also an infringement under 15 U. S. C. 1114(1). This section of the trademark act states that any infringer shall be liable to civil action with an exception ". . . registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such mark is intended to be used to cause confusion or mistake or to deceive purchasers." Defendant had recognized and agreed that its use of the trademark "E & J" was causing confusion and mistake to purchasers.

Defendant added to the confusion by approving advertisements which credited its products to plaintiff. [Ex. 76, R. 419.] Defendant also sees no objection in the use

of its distributors in advertising wheel chairs and resuscitators in the same advertisement under the designation "E & J Distributor." [Ex. 75, R. 417-418.]

This was intentional infringement. No excuse can be offered by defendant for this infringement as it knew what the result would be. The District Court held that there was no intent by the defendant to cause confusion. [Find. of Fact 13, R. 29.] There is no evidence to sustain this finding. The only evidence is the admission by the defendant that its use caused confusion. The finding of fact of the District Court was in complete error and completely ignored the testimony.

Plaintiff, therefore, insists that it is entitled to an accounting for damages and profit for the intentional and willful acts of the plaintiff in using the trademark "E & J" to cause confusion or mistake to purchasers. (15 U. S. C. 1114(1), 1117.)

Conclusion.

The plaintiff's herein insist on their trademark rights for many reasons. Among others that have been set forth herein before is the fact that plaintiff's products are life saving machines. Like all machines, they are subject to wear and deterioration. Such a machine with defective or worn parts could be dangerous. If a resuscitator were needed and it were inoperable because of a worn or defective part, a patient in a hospital or elsewhere might die because of the failure of the resuscitator. [R. 232-234.]

Plaintiff's business is tied to these factors. It has competitors. If orders for replacement or repair parts are not promptly delivered to the plaintiff, it cannot fill these orders. During this time the machine is inoperative. If a user cannot get his life saving equipment

promptly restored to operating condition because his orders go astray or become confused with another company, he will soon cease to do business with the plaintiff and take on plaintiff's competitors as a replacement. In fact, if the condition continued for any length of time, new purchasers would learn of the difficulty of getting replacement parts and would prefer competitors.

This confusion caused by the use of "E & J" by the defendant is very serious. As said by the defendant's president, ". . . this is a terrible mistake." [R. 369.] The plaintiff-appellee herein believes that in the face of all the evidence submitted to sustain the District Court's findings of fact, that this Court should affirm the District Court's finding of confusion and infringement.

And furthermore, this Court should reverse the District Court in its finding that the infringement herein was accidental, as there is no proof of any kind but that this infringement was intentional and that the defendants had knowledge that the infringement would cause confusion and damage to plaintiff. This Court should reverse this finding and instruct the District Court to grant an accounting under 15 U. S. C. 1117 to determine the amount of plaintiff's damages caused by the intentional infringement of defendant.

Respectfully submitted,

LYON & LYON,

By FREDERICK W. LYON,

Attorneys for Appellee.



No. 15922

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EVEREST & JENNINGS, INC., a Corporation,

Appellant,

vs.

E & J MANUFACTURING COMPANY, a Corporation,

Appellee.

E & J MANUFACTURING COMPANY, a Corporation,

Appellant,

vs.

EVEREST & JENNINGS, INC., a Corporation,

Appellee.

REPLY BRIEF FOR APPELLANT, EVEREST & JENNINGS, INC.

FILED

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FRED H. MILLER,

ALLAN D. MOCKABEE,

PAUL P. O'BRIEN, CLERK

By FRED H. MILLER,

108 West Sixth Street,

Los Angeles 14, California,

Attorneys for Everest & Jennings, Inc.



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Appellee.

REPLY BRIEF FOR APPELLANT, EVEREST & JENNINGS, INC.

In the brief filed on behalf of plaintiff cross-appellant it is stated at page 6 that there is no dispute but

“That a defendant has the right to use his own surname on products that it manufactures and sells as long as it does so fairly and honestly.”

In fact, *American Distilling Co. v. Bellows*, 102 Cal. App. 2d 8, cited by plaintiff at page 8 of plaintiff's brief, reaffirms this principle by quoting from *Thaddeus Davids Co. v. Davids*, 233 U. S. 462, and supplying emphasis thereto as follows:

“This we conceive to be the meaning of the statute. (the ten year proviso of the act of 1905.) It follows that where the mark consists of a surname, a person having *the same name* and using *it in his own busi-*

ness although dealing in similar goods would not be an infringer provided that the name was not used in a manner tending to mislead and it was clearly made to appear that the goods were his own and not those of the registrant.”

It should be obvious that if two parties use the same surname to brand their respective goods which are of like character that some mistakes and some confusion would be bound to occur. The second user, however, has the absolute right as a principle of law to use his name as long as he does it fairly and honestly regardless of the mistakes, regardless of the confusion, and regardless of the injury that may result to the first user. This is but a necessary bane inherent in the selection of the use of a surname by the first user. He should reasonably expect that others having the same surname may engage in a competing business.

We part company with the plaintiff when plaintiff asserts our contention to be,

“That a party has the right to use an arbitrary trademark such as the trademark ‘E & J’ if it happens to be the initials of the party or a nickname for the party, without regard to any injury that he may cause a prior user in the same field”. (Pltf. Br. p. 6.)

and then disagrees with it.

In the first place the initials “E & J” are not arbitrary; they are the initials of Erickson and Johnston, the predecessors of the plaintiff [Request for Admission 66, R. 448] and they are also the initials of Everest and

Jennings, the predecessors of the defendant. Furthermore, these initials are not used by the parties "in the same field." Plaintiff is in the resuscitator and gas machine field having its own competitors and its own group of potential purchasers. Defendant is in the invalid wheel chair field having its own competitors and its own group of potential purchasers. A patient having need for a resuscitator or gas machine is too sick to have need for a wheel chair, and a person having need for a wheel chair may be assumed to have recovered from the effects of having been under one of plaintiff's resuscitators or gas machines.

True—if the field is defined with sufficiently germane language it may be defined in terms broad enough to encompass the goods of the plaintiff as well as those of the defendant, *i.e.*, "hospital supply field." A hospital is in the market for almost anything that may be used for the comfort, convenience, recovery or repair of the human body—from ambulances and parts thereof to sutures. This does not mean that every item sold to a hospital is in the same field any more so than every item sold to a department store is in the same field; or every item sold in a modern drug store is in the drug field; or that everything sold in a super market is in the super market field. Nor does it mean that every item considered in the two *Sunbeam* cases, 183 F. 2d 969 and 191 F. 2d 141, was in the same field because it was in the electrical field. The mere fact that plaintiff's and defendant's goods are sold to or by the same concern does not

make them “goods of the same descriptive properties” as the term was used in the Act of 1905.

We contend the right to use one’s own surname fairly and honestly as a brand for his goods extends in principle to his initials and to nicknames or other names by which he is popularly known. At least that is the holding in the State Courts of California where this action arises. *D & W Food Corporation et al. v. Graham*, 286 P. 2d 77, 107 U. S. P. Q. 24:

“We have found no case holding that the rule under discussion is limited to family names, and no logical reason for so limiting it has occurred to us or been suggested by plaintiffs. Nor is there any logical reason why the general rule should not apply to generally used ‘nicknames’ or abbreviation of given names. *It is the right to use the names by which one is generally known that is entitled to protection.*” (Emphasis added.)

While this Court is at liberty to disagree therewith, we believe the opinion to be logical and based on sound reason, and we urge this Court to adopt and follow the principle of that opinion.

If the defendant has the right to honestly and fairly use its initials just as much as it has the right to use its name, it matters not that some have been mistaken or confused as to which company was which or which company puts out what, and it matters not whether laymen, Everest and Dunn in their testimony [R. 367] and letter, Exhibit 40, respectively, labeled misaddressed mail as “confusion.”

At the risk of repetition we again call attention to the fact that this Court expressly said in *Sunbeam Lighting v. Sunbeam Corporation*, 183 F. 2d 969, 86 U. S. P. Q. 240:

“* * * the case is not solved by the simple finding as to whether defendants’ use of the word ‘Sunbeam’ results ‘in confusion and likelihood of confusion.’ The answer to that question is material *but circumstances not included in the framed statement must be taken into consideration.*” (Emphasis added.)

Here, we have the added circumstances:

(1) That “E & J” are the initials of the defendant.

(2) That defendant’s goods are different from those of plaintiff.

(3) That defendant’s goods cannot be sold as substitutes for those of plaintiff.

(4) That as testified to by plaintiff’s witness, Garrett [R. 556].

“* * * It is considerably easier for us to call them ‘E & J’ than ‘Everest & Jennings.’ ”

We believe that the law still is as expressed in *Howe Scale Co. v. Wyckoff*, 198 U. S. 118:

“* * * Courts will not interfere where the only *confusion*, if any, results from a similarity of the names and not from the manner of use.” (Emphasis added.)

We believe that Courts likewise will not interfere where the only confusion, if any, results from a similarity of the initials of the names and not from the manner of use.

Plaintiff's Cross-Appeal.

On June 4, 1958, the Clerk of this Court forwarded copies of the printed record to counsel for the parties. In a covering letter he wrote:

“Under Rule 20 the brief for appellant must be served and filed not later than July 9, 1958; the brief for appellee served and filed within 30 days after service of brief for appellant, and the appellant is privileged to serve and file a reply brief within 10 days after service of brief for appellee.

“You will be advised when the cause is definitely assigned for hearing.

“Requests for extension of time will not be considered except for extraordinary cause.”

No brief was served or filed on behalf of the plaintiff cross-appellant within the allotted time. On August 7, 1958, defendant's counsel received copies of “Opening Brief for Appellee Cross-Appellant, E & J Manufacturing Company” which at pages 20 *et seq.*, undertakes to argue defendant's contentions with respect to its cross-appeal. We do not believe that presentation of plaintiff's brief on plaintiff's cross-appeal at such time should be considered timely—particularly when the time for the defendant-appellant to file a reply brief was limited by the Clerk's covering letter to *ten days* and “Requests for extension of time will not be considered except for extraordinary cause.”

However, in response to plaintiff's contentions we should call attention to the following:

If the plaintiff now contends that there was a binding contract between the plaintiff and the defendant to discontinue the use of “E & J” in its advertising and correspondence it is not apparent how this Court has jurisdic-

tion to enforce it. There is no diversity of citizenship between the parties [R. 3 and 4]. If the plaintiff believes that there was a binding and enforceable contract the State Courts have always been open to the plaintiff for this purpose.

Plaintiff candidly urges at page 21 of its brief its contention to be

“1. The plaintiff and defendant entered into a contract in 1949 binding the defendant to cease and desist in the further use of the trademark ‘E & J.’”

This statement is not in conformity with the record. The letter, Exhibit 40 [R. 707] reads:

“We assured Mr. Stanton that we would cooperate in every way in clearing up this confusion by eliminating the letters E & J from our *advertising* and *correspondence*” only. (Emphasis added.)

Had the writer of Exhibit 40 intended to assure both Mr. Beardsley and Mr. Stanton in his letter that defendant would “cease and desist in the further use of the trademark ‘E & J’” as now asserted by plaintiff at page 21 of its brief, we believe that the letter, Exhibit 40, would have said so in so many words.

It was not the intention of the defendant at any time to discontinue use of the trademark “E & J” on the wheel chairs themselves. Herbert A. Everest testified, in the course of the opposition proceeding and long before this lawsuit was started [R. 366] as follows:

Q36. Did you agree to discontinue the use of the ‘E & J’ initials or ‘E-J’ initials on the wheel chairs themselves at the time of this conference?
A. No. We agreed to stop using ‘E & J’ in our

advertising. We had just started it that last year. Customers were always ordering 'E & J' chairs, so we put it in our advertising that year. And when they requested that we stop it, why, we did, and in our next catalogue we eliminated it. But we talked it over and we said that these dies were new, cost us about \$900 and *we would continue to use the 'E-J' on the foot rest*, but stop advertising the 'E & J' so as to lessen the confusion.

Q-37. Lessen the mix-up in mail, you mean? A. Yes."

Defendant never had discontinued using the initials "E-J" on the chairs themselves, but did discontinue use of "E-J" in its advertising from the fall of 1949, to the end of 1952, in accordance with its assurance. This discontinuance of the advertising of "E-J" did not result in any great difference in the amount of mixed-up mail between the parties and advertising of "E-J" was consequently resumed in 1953.

The plaintiff attempts to spell out of these negotiations and the letter, Exhibit 40, a binding contract citing *Dillon v. Lineker*, 266 Fed. 688. Attention is invited to the fact, however, that *Snyder v. Roberts*, 45 Wash. 2d 865, 278 Pac. 153, also cited by plaintiff, calls attention to the fact that the cases are reviewed in 74 A. L. R. 293, where it is stated:

"It is well settled that mere forbearance to exercise a legal right *without any request to forebear* or circumstances from which an agreement to forebear may be implied is not a consideration which will support a promise." (Emphasis added.)

Cases are collected to the effect that an agreement to forebear is necessary. California is included among those states that follow this theory in

Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403;
Re Thompson, 165 Cal. 290, 131 Pac. 1045;
Tiffany v. Spreckels, 202 Cal. 778, 262 Pac. 742;
Schumann Heinke & Co. v. U. S. Natl. Bank, 292
Pac. 547.

As the note in 74 A. L. R., *supra*, indicates, there is a division of authority as to whether an agreement to forebear is absolutely necessary. Some cases hold that an agreement to forebear is unnecessary *where there has been a request to forebear* including *Dillon v. Lineker*, 266 Fed. 688, cited by the plaintiff.

In the present case there was no agreement to forebear and there was no request on the part of the defendant that the plaintiff forebear the institution of legal proceedings. Therefore, under the most liberal view, there was no

“contract binding the defendant to cease from further use of the trademark ‘E-J’ [Finding 16, R. 30.]

Defendant never at any time proposed discontinuing entirely the use of E-J as its trademark.

Plaintiff’s president, Beardsley, never regarded Exhibit 40 as a binding agreement. He never bothered to look up the defendant’s advertising to see whether the defendant had actually deleted “E-J” from its advertising [R. 460]:

“Did you continually look at the hospital magazines for Everest & Jennings advertising from the first of 1950 until May of 1953? A. No, I didn’t do that.”

Yet, on May 18, 1953, plaintiff instituted the opposition proceedings in the United States Patent Office in an effort to deny registration of defendant's trademark.

We do not believe that plaintiff's position is consistent. Plaintiff now says that there was a binding contract requiring defendant to cease and desist *all* use of "E-J" and that Exhibit 40 proves it. Exhibit 40 did not propose discontinuing all use of "E-J" but only in advertising and correspondence. Exhibit 40, by its own restrictive wording, contemplated continued use of the trademark "E-J" on the chairs themselves.

Plaintiff now claims that the consideration for the "agreement," Exhibit 40, was plaintiff's forbearance to litigate, yet plaintiff instituted the opposition proceedings in the Patent Office to the registration of defendant's trademark on May 18, 1953, more than a year before the present lawsuit was filed.

In other words, plaintiff now chooses to place its own interpretation on Exhibit 40 contrary to its express terms and assert that it has foreborne litigation which is contrary to fact.

We respectfully submit that the plaintiff cannot now logically contend that there was a binding contract between the plaintiff and the defendant requiring the defendant to cease and desist in all further use of the trademark "E & J" the consideration for which was plaintiff's forbearance of litigation, when the plaintiff has already and long since construed its arrangement with the defendant otherwise by instituting the opposition proceeding against plaintiff's trademark registration on May 18, 1953.

Conclusion.

There has been no deceit or fraud practiced by the defendant with respect to the plaintiff's trademark. Instead, there has been a legitimate, bona fide, honest and fair use of defendant's own initials to identify its own products in its own trade. Such mistake or confusion as has arisen from these acts of the defendant is not actionable at law or in equity. The plaintiff should be content with a monopoly on the initials in the resuscitator and gas machine field. Certainly, the defendant is content with the initials in the invalid wheel chair and walker field. These entire proceedings are but a bold-faced attempt on the part of the plaintiff and its owner, American Hospital Supply Corporation, to move into the invalid wheel chair field and apply the initials "E & J" to the invalid wheel chairs that American Hospital Supply Corporation is now having manufactured.

We urge this Court to once and for all put an end to such encroachment.

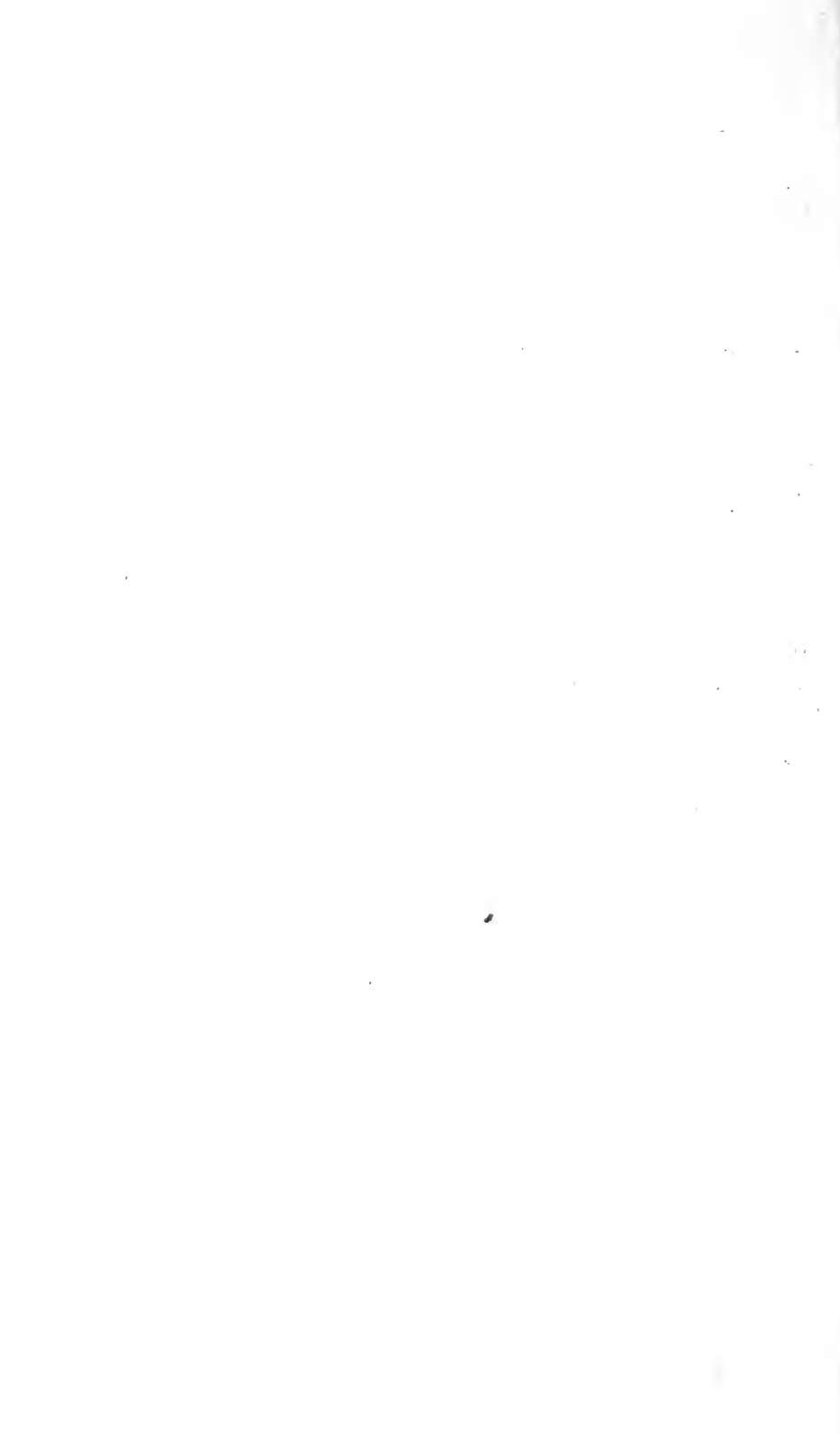
Respectfully submitted,

FRED H. MILLER,

ALLAN D. MOCKABEE,

By FRED H. MILLER,

Attorneys for Everest & Jennings, Inc.



No. 15922

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EVEREST & JENNINGS, INC., a Corporation,

Appellant,

vs.

E & J MANUFACTURING COMPANY, a Corporation,

Appellee.

E & J MANUFACTURING COMPANY, a Corporation,

Appellant,

vs.

EVEREST & JENNINGS, INC., a Corporation,

Appellee.

PETITION FOR REHEARING UNDER RULE 23.

FILED

JAN 22 1959

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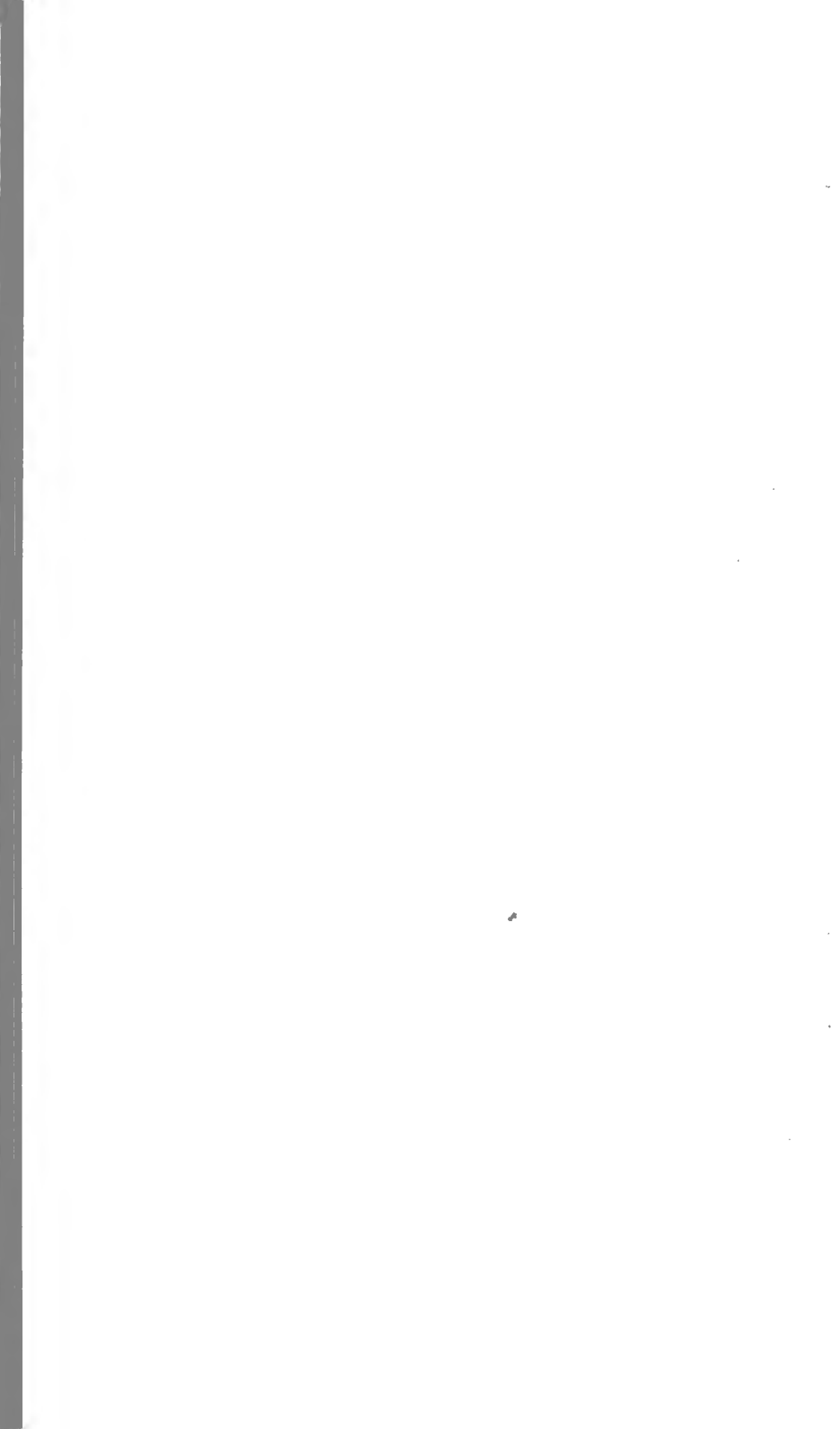
FRED H. MILLER,

ALLAN D. MOCKABEE,

108 West Sixth Street,

Los Angeles 14, California,

Attorneys for Everest & Jennings, Inc.



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PETITION FOR REHEARING UNDER RULE 23.

The defendant, Everest & Jennings, Inc., respectfully petitions this Court for a rehearing under Rule 23 for the following reasons.

True Statement of Defendant's Contentions.

At page 6 of the present opinion the statement is made

"It is the position of defendant that the Federal Trademark Laws do not prevent a person or corporation from honestly and fairly using its own name or abbreviation thereof on his or its own goods. Defendant claims that therefore it is entitled to use the trademark 'E-J' *without restraint.*"*

*Italics are supplied herein for purposes of emphasis unless otherwise indicated.

Defendant has not claimed and does not claim to be entitled to use the trademark *without restraint*. It is not necessary to the defendant's case to make such a broad contention. On the contrary, defendant contends that its use of its own initials has been done honestly and fairly and has only been with *self-imposed restraints* reasonably designed to avoid confusion. If these self-imposed restraints are insufficient this Court should identify them and enjoin their use only. If the self-imposed restraints are sufficient and demonstrate that defendant is attempting no fraud or deceit as found by the Trial Court in its oral opinion [R. 479] then the action should fail.

It should be borne in mind that the law has never required that the defendant *insure* against *all* confusion but merely to take such precautionary steps that there is no *reasonable likelihood* for confusion, which will result in damage to the plaintiff or deceit of the public.

It should also be borne in mind that plaintiff's rights are restricted to its use of its trademark on its goods which being resuscitators and oxygenators, are radically different from invalid wheel chairs and walkers. As said in *American Steel Foundries v. Robertson*, 269 U. S. 372, 382:

"The mere fact that one person has adopted and used a trademark on his goods does not prevent the adoption and use of the same trademark by others on articles of a different description. There is no property right in a trademark apart from the business or trade in connection with which it is employed."

A true statement of defendant's contention is not that defendant contends that it is entitled to use the trademark "E-J" *without restraint*, but instead, what the defendant has done in using its trademark has been done honestly

and fairly with self-imposed restraints already applied by the defendant. These restraints are reasonably designed to prevent all "likelihood of confusion" as this term is used in the statute. Defendant cannot prevent confusion or mistake resulting from pure carelessness or a lack of a reasonable amount of attention on the part of the prospective purchaser. Defendant is only responsible if it acts or use of its trademark will result in confusion or mistake in spite of the use of reasonable care or a reasonable amount of attention on the part of the trade. The present self-imposed restraints are reasonably designed to prevent all confusion except on the part of the careless and the inattentive.

The Fact That the Name of the Defendant Corporation Is Derived From the Surnames of Its Incorporators Has Relevancy.

At page 6 of the present opinion the statement is made "Whatever rights a person may have to use his own name are not relevant here. Everest & Jennings, Inc., is an arbitrary name selected as the name of a corporation, and, as such corporation, is not entitled to the same equitable considerations as an individual using his own name."

The same identical contention was made in *Howe Scale Company v. Wyckoff, Seamans and Benedict*, 198 U. S. 118, and rejected by the Supreme Court. In that case the plaintiff claimed as trademarks for typewriters "Remington typewriter" and "Remington standard typewriter" and claimed to have registered "Remington" and "Remington Standard" as trademarks applied to typewriters. The defendant was charged with fraud and unfair competition in making use of the corporate name, "Remington-Sholes Company," and the designations "Remington-Sholes," "Rem-Sho," and "Remington-Sholes Company"

in advertising for sale, offering for sale, and selling typewriting machines. It is to be observed from these facts that the name of the accused company, Remington-Sholes Company, was not the surname of "Remington" alone or "Sholes" alone, and that the trademark "Rem-Sho" was not an abbreviation of the surnames of either "Remington" or "Sholes" but an abbreviation of the name Remington-Sholes Company.

Petitioner's counsel contended at page 126:

"It being a general custom to employ personal names for corporations, no distinction can be made between the use of such names in a firm and in a corporation since in both cases the names adopted are selected and artificial. (Citing cases.)

"The courts recognize that the business of a corporation or of a firm in which a man has his capital invested and to which he devotes his whole time and energy is his business, and that he has a right to use his name in connection therewith.

"Although it is true that there is no necessity for a man engaged in a corporation or in a firm to employ his name in connection therewith—since both firm and corporate names are alike artificial—this lack of necessity for using a personal name cannot affect the individual's right to so use it, for such use is a universally recognized legitimate and reasonable use of a personal name." (Citing cases.)

Counsel for respondents contended at page 131:

"Corporations which do not inherit their names but assume them voluntarily, may not use their assumed names if such use shall result in the confusion and deception of the public and the displacement of the good will of another's business (citing cases.) The selection of this particular name shows fraud (citing cases.)"

The court in its opinion said at page 138:

“The formation of a corporation was an effective form of business enterprise and was not only reasonable in itself, but the usual means in the obtaining of needed capital. And as Wallace, J. said: ‘It was natural that those who had invented the machine and had given all their time and means in introducing it to the public, when they came to organize the corporation which was to represent the culmination of their hopes and efforts, *should choose their own name as their corporate name. In doing so, I think they were exercising only the common privilege that every man has to use his own name in his own business* provided it is not chosen as a cover for unfair competition. They did not choose the complainant’s name literally or so closely that those using ordinary discrimination would confuse the activity of the two names and that differentiation is sufficient to relieve them of any imputation of fraud.’ ”

Page 140:

“Neither of them (Remington or Sholes) was paid for the use of his name, and neither of them had parted with the right to that use. *Having the right to that use, courts will not interfere where the only confusion, if any, results from a similarity of the names and not from the manner of use.* The essence of the wrong in unfair competition consists in the sale of goods of one manufacturer or vendor for those of another, *and if defendant so conducts its business as not to palm off its goods as those of complainant the action fails.*

“As observed by Mr. Justice Strong in the leading case of Canal Co. v. Clarke, 13 Wall. 311: ‘Purchasers may be mistaken but they are not deceived by false representations and equity will not enjoin

against telling the truth.' And by Mr. Justice Clifford in *McLean v. Fleming*, 96 U. S. 245: 'A court of equity will not interfere when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other' * * *

"We hold that in the absence of contract, fraud, or estoppel any man may use his own name in all legitimate ways, *and as the whole or a part of the corporate name*. And in our view defendant's name and trademark were not intended or likely to deceive and there was nothing of substance shown in defendant's conduct in their use constituting unfair competition or calling for the imposition of restrictions lest actionable injury might result as may confessedly be done in a proper case."

In view of the foregoing ruling made on the contentions advanced by opposing counsel, it is respectfully submitted that Everest, in a legitimate exercise and use of his own name, could bestow his surname on the partnership, Everest & Jennings, *and on the corporation* that he subsequently helped cause to be incorporated. Similarly, Jennings could bestow the use of his own surname on the partnership and on the corporation which he, with Everest, helped create for the purpose of exploiting the wheel chairs that they had jointly invented and to which they had given all their time and means in introducing to the public.

The fact that the name of the defendant-corporation was derived from a combination of the surnames of the two incorporators is just as relevant here as it was with Remington and Sholes, as it was a legitimate exercise of their rights for Everest and Jennings to use their surnames in the corporation which they caused to be created to raise capital and exploit their wheel chairs. The corporation, as the recipient of such a bestowal, is entitled to the same equitable consideration as the individuals from

whom its name is derived. We conceive this to be the express holding of the Supreme Court in *Howe Scale v. Wyckoff, Seamans & Benedict, supra*, and that it is *contra* to the statement made by this court in its opinion.

The goodwill developed by the partnership, Everest & Jennings, after it was created did not become the private property of either Everest & Jennings, individually, but belonged to the partnership. And when the corporation was formed it acquired such goodwill and assets as the partnership held, and developed further goodwill of its own which was not the property of Everest & Jennings, individually, nor the private property of any other stockholder. We submit, therefore, that it is a relevant consideration whether the name, Everest & Jennings, Inc., is merely an arbitrary or fictitious name, or whether this name was derived from a legitimate and fair use of the rights of Everest or Jennings, individually, to use their surnames in the corporate name of the corporation that they caused to be created.

If anything is irrelevant at this point in the opinion it is the citation of the *Brooks* case (*Brooks Bros. v. Brooks Clothing of Calif.*, 60 Fed. Supp. 442) for as stated in the *Brooks* opinion:

“So at the outset we are confronted with the situation that the defendant has no natural right to the use of ‘Brooks’ in its corporate name or in its business. *No man of that name has ever been connected with it.* It adopted the name as a convenience. Consequently, as to it, the plaintiff’s rights are not even circumscribed as they *would be if dealing with a business using the family name of a natural person who is connected with it.*”

The fact that Everest is now no longer affiliated with defendant-corporation is immaterial. If one of the incor-

porators of a corporation dies after having bestowed the use of his name on the corporation he helped to create to exploit and introduce his invention to the public, certainly rights of the corporation continue to use the surname thereafter and do not die with him. And if the incorporator sells out his stock and quits the corporation and goes elsewhere, the rights of the corporation to continue with the use of his name and to retain the goodwill that the corporation has developed in connection therewith manifestly continues.

See, *Herring-Hall-Marvin Safe Co. v. Hall's Safe Co.*, 208 U. S. 554, 558:

"The original company from 1867 to 1892 was attaching to Hall's safes the reputation that made the name famous and desired. Whoever achieved it did so through the medium of the company. *The good will thus gained belonged to the company* and was sold by it with all its rights when it sold out. See *Le Page Co. v. Russia Cement Co.*, 51 Fed. Rep. 941, 943. So that the question is narrowed to what its rights would have been at the present day if it had kept on."

We respectfully submit, therefore, that it is a relevant consideration that the name of the defendant-corporation was derived from the individuals, Everest and Jennings who caused it to be created. It is not an arbitrary name selected as the name of a corporation but is a name derived from the rights of Everest and Jennings, as individuals, to use their own names in their own business, regardless of whether such business is a partnership or a corporation. The corporation deriving its name in this manner, is entitled to the same equitable considerations as those that Everest and Jennings "would have been at the present day if it (they) had kept on."

Nature and Breadth of the Injunction.

At page 7 of the opinion the statement is made:

“Our main problem on the defendant’s appeal is the breadth of the injunction issued by the trial court.”

At page 10, this court concludes:

“The injunction should prohibit the use by the defendant of the mark ‘E & J’, or any colorable imitation thereof, including ‘E-J’ by defendant in connection with its correspondence, advertising, catalogs, and any other form of sales promotion * * *.”

We interpret this to mean that the defendant is to be absolutely prohibited in using “E & J” or “E-J” *in any form whatsoever* in its correspondence, advertising, catalogs, and all forms of sales promotion regardless of how closely it may have associated or depicted therewith the full name and address of the defendant. Nowhere in the opinion is there any reference to any correspondence, advertising, or catalogs or form of sales promotion that is characterized by this court as being wrongful.

In *Singer Mfg. Co. v. June Mfg. Company*, 163 U. S. 169, 200, the Supreme Court said:

“This leaves only two questions, first, whether the name as used in the circulars and advertisements of the defendant is accompanied with such plain information as to the source of manufacture of the machines by them made as to make these circulars and advertisements lawful; and second, whether this also is the case with the use of the word ‘Singer’ on the machines which the defendant makes and sells. As to the first of these inquires, the proof shows that the *circulars are so drawn as to adequately indicate*

*to anyone in whose hands they may have come that the machines therein referred to are made by the June Manufacturing Company and not by the Singer Company. We therefore dismiss the circulars from view * * *."*

We respectfully submit that the injunction should not prohibit all use by the defendant of the use of "E & J" or "E-J chairs" in its own correspondence with its own dealers, or its own customers when such use is on correspondence paper bearing the defendant's own letterhead showing the full name and address of the defendant. The trade has been referring to the defendant's products as "E & J chairs" for years, see for example Defendant's Exhibits G and H appearing at 771 and 773 of the record. It will probably continue to do so regardless of what kind of an injunction is issued herein. Is the entire trade to be allowed to refer to the defendant's products as "E & J chairs" in correspondence and otherwise, but the defendant in replying to such correspondence to be denied the right to answer such correspondence in the trade's own language? Certainly, use by the defendant of the terms "E & J chairs" or "E-J chairs" in its own correspondence under its own letterhead with its own customers and with its own dealers has not been shown to be the cause of any confusion, and it is inconceivable how it could be. An absolute injunction prohibiting the defendant talking or writing to its own dealers and customers in terms of their own language is too broad and is not justified by the record.

The injunction should not prohibit all use by the defendant of "E & J" or "E-J" or any colorable imitation thereof in its own catalogs where the full name of the defendant and defendant's full address conspicuously ap-

pear. In *Singer v. June, supra*, the circulars which may have been in the form of small catalogs or brochures were “so drawn as to adequately indicate to anyone in whose hands they may have come that the machines therein referred to were made by the June Manufacturing Company and not by the Singer Company. We therefore dismiss the circulars from view.”

In the present case defendant’s catalogs likewise are so drawn as to adequately indicate to anyone in whose hands they may have come that the wheelchairs therein referred to are made by the defendant and not by the plaintiff. These catalogs should consequently be dismissed from view.

Defendant’s catalog for 1952, has been introduced in evidence [R. 387] as Exhibit E. This catalog is typical of defendant’s other catalogs. The full name of the defendant appears on the cover. On page 1, there is displayed a shield in the upper left-hand corner of which is the letter “E” and the lower right-hand corner there appears the letter “J.” Between these letters “Everest & Jennings” is written horizontally in full. Is such a use in defendant’s catalog a colorable imitation of “E & J” or “E-J” and to be enjoined under the present opinion, or should it be dismissed from view as in *Singer v. June, supra*?

On page 3, the shield again appears not only with the full name of the defendant across the shield, but in addition thereto the full name and the then street address of the defendant is given as being the designer, manufacturer and distributor. Is this use of the initials “E & J” wrongful and to be enjoined, or is it to be dismissed from view as in *Singer v. June, supra*?

On page 4, the shield again is displayed and the full name of defendant not only appears on the shield itself, but it also appears on the illustrations of Plant No. 1 and of the administration office.

On page 5, Everest & Jennings is written in full four times and neither "E & J" nor "E-J" are used. On page 7, Everest & Jennings is written in full three times, and "E & J" or the equivalent does not appear. On pages 9 and 10, Everest & Jennings is written in full in bold type.

On page 11, Everest & Jennings in full appears four times in bold type and the shield also is displayed but without defendant's name therein. At the bottom of the page the statement is made, "One easy motion folds an E & J chair; merely lift the seat." Is this use of the initials "E & J" to be completely and forever barred to the defendant, or should it be dismissed from view as in *Singer v. June*, because of the prominent and close association of the defendant's full name signifying that "E & J" in reference to wheel chairs refers to wheel chairs of the defendant's manufacture?

On pages 14 and 15 the full name of the defendant appears prominently and boldly, and the same is true of pages 16 to 20.

On page 20 the heading is "Everest & Jennings Hospital Chair" in bold type. In smaller type the statement is made "The lightweight E & J hospital chair is easily adjusted * * *." Is this use of "E & J" to be enjoined entirely and forever, or is it to be dismissed from view because it unmistakably or boldly appears that "E & J" is but a nickname or abbreviation for defendant's full name?

On pages 21, 22, 26, 27, 28, 29 and 30, the full name of the defendant boldly appears.

On page 32 the shield appears without defendant's name therein, but defendant's full name appears in bold type at the top of the page.

On page 33, defendant's full name appears at the top of the page in bold type.

At the top of page 34 the heading is "E & J custom built back modifications." Here, the use of "E & J" rather than Everest & Jennings was obviously adopted because of the limitations of the width of the page and to avoid making a two-line heading as on page 35. It should be obvious to any peruser of this catalog at this point that "E & J" is but an abbreviation for defendant's full name so conspicuously displayed elsewhere throughout the catalog. Is this use of "E & J" to be forever barred to the defendant, or should it be dismissed from view under the circumstances set forth in *Singer v. June, supra*?

On page 36 the heading is "E & J optional footrest and legrest accessories," and the illustrations of the footrests show how the initials "E-J" are displayed thereon.

On page 37 the heading is "Additional E & J modifications not illustrated." The shield without the defendant's name is displayed but defendant's full name appears elsewhere on this page. In view of the fact that defendant's full name appears not only on this page but prominently elsewhere throughout the catalog, are these to be enjoined? Can defendant no longer illustrate the footrests as illustrated on page 36? Can defendant no longer use the shield in the catalog? Can defendant no longer use the abbreviation "E & J" on a page of its catalog where

the length of the title renders it inexpedient to use the defendant's full name because of the limitations of page widths?

On page 38 the name Everest & Jennings is again used in full in bold type in the title. The same is true of page 40 in the title "Everest & Jennings adjustable folding walker." On this page in smaller type the statement is made, "With the E & J adjustable folding walker the user when tired can sit * * *." Was it the intention of this court to enjoin such use of "E & J" when the full name of defendant appears in bold type at the top of the page?

On page 42 the heading at the top of the page reads, "Everest & Jennings Commodes." In smaller type on the same page two styles are identified, to wit, "E & J over toilet commode" and "E & J bedside commode." Is this use of "E & J" to be enjoined or as indicated in *Singer v. June, supra*, is the page so "drawn as to adequately indicate to anyone in whose hands they may have come that the machines therein referred to were made by the" defendant and not the plaintiff and should consequently be dismissed from view.

On each of the remaining pages of Exhibit E the full name of the defendant appears at least once. On the rear cover there is again displayed the shield bearing defendant's full name across the middle and the statement "E & J chairs are recognized as the standard of quality."

We respectfully submit that to enjoin all use by the defendant in its catalogs of the initials "E & J" as an abbreviation for its own name where the defendant's full name and address appear prominently elsewhere in the same catalog is going entirely too far.

Advertising.

What we have called attention to in defendant's catalog Exhibit E, is equally applicable to defendant's advertising. Defendant's witness, Harry Dunn, Vice President in charge of sales and promotion for Everest & Jennings, Inc., testified [R. 388]:

"Q. (By Mr. Miller): Since December, 1952, has the Everest & Jennings Company at any time used the initials 'E' and 'J' in a situation where the full name of Everest & Jennings did not appear in close proximity to it? A. Not to my knowledge. If so, it was contrary to my instructions.

Q. What were your instructions to your advertising department or your advertising agency?

* * * * *

The Witness: The advertising agency was instructed to use the name of Everest & Jennings wherever the initials 'E' and 'J' were used, or wherever the shield bearing the initials 'E' and 'J' were used."

A sample of defendant's magazine advertising appears in Hospital Progress Exhibit 39 at page 94A. In the advertisement the heading in bold type is "Everest & Jennings folding wheel chairs." The advertisement is signed with the full name of the defendant and defendant's street address. In the body of the ad and in smaller type three references are made to the defendant's chairs or folding wheel chairs as "E & J."

Certainly defendant's case here is much stronger than that of the defendant in *Singer v. June, supra*. Therein defendant's name was not Singer and no one connected with the defendant was named Singer. Defendant had merely acquired the right to use the name Singer by reason of its having passed into the public domain with the expi-

ration of plaintiff's patents. As it clearly appeared on the circulars that the manufacturer of the defendant's machines was the defendant, the circulars were dismissed from view. *A fortiori* defendant's magazine advertising should likewise be dismissed from view until established to be wrongful, deceitful, or fraudulent. The injunction should not enjoin a legitimate use of the initials where defendant's name as manufacturer clearly appears.

Another example of defendant's advertising is that advertising which appears in the yellow pages of telephone books throughout the country. A typical sample of that advertising has been introduced as Defendant's Exhibit F [R. 390, 391] transmitted as a physical exhibit. For a more ready reference, see column 2 of page 2029 of the current yellow pages of the Los Angeles Telephone Directory. Therein, the defendant's shield previously described is displayed. The reproduction of the shield is so small that the full name of the defendant cannot and does not appear *therein*. However, immediately adjacent the shield in bold type appears the full name of the defendant. The advertising done in the yellow pages of the telephone books certainly identifies wheel chairs symbolized or identified by the shield as being manufactured by the defendant and no other. Is the display of the shield with the initials "E & J" thereon as depicted in this exhibit to be forever barred and denied to this defendant, or is it to be dismissed from view because of the prominent, bold identification of the defendant which is merely symbolized by the shield?

The present opinion would seem to deny to the defendant all use of the initials "E & J" in correspondence, catalogs, advertising and promotional matter of any kind regardless of whether it is used in conjunction with the full

name and address of the defendant or not. In this respect the injunction goes much farther than in *Singer v. June* and unjustifiably so. Certainly there has been no confusion and there is no likelihood of confusion arising from prospective purchasers reading defendant's correspondence, catalogs, advertising or promotional material as displayed by the record in this case. If an injunction is to be issued directed against such advertising, catalogs or promotional literature, it should be restricted in the same manner as the injunction was restricted in *Singer v. June, supra*, to wit:

“first, from using the word Singer (E & J or the equivalent) or name equivalent thereto in advertisements in relation to sewing machines (wheel chairs) without clearly and unmistakably stating in all said advertisements that the machines are made by the defendant as distinguished from the sewing machines (resuscitators and oxygenators) made by the Singer Manufacturing Company (the E & J Manufacturing Company).”

As the defendant has already self-imposed these restraints no wrong has been committed and the action should therefore fail. But even if an injunction were issued it certainly should be no more onerous than in *Singer v. June, supra*.

While we have compared the facts of this case closely with the facts and ruling of *Singer Manufacturing Company v. June Manufacturing Company, supra*, a similar line of distinction exists in *Herring-Hall-Marvin Safe Company v. Hall's Safe Company*, 208 U. S. 554, one of the cases cited by this court in its opinion. At page 559, the Supreme Court said:

“Some of the Halls might have left it and set up for themselves. They might have competed with it,

they might have called attention to the fact that they were the sons of the man who started the business, they might have claimed their due share, if any, of the merit in making Hall's safes what they were. *White v. Trowbridge*, 216 Pa. State 11, 18, 22. But they would have been at the disadvantage that some names and phrases otherwise truthful and natural to use, would convey to the public the notion that they were continuing the business done by the company, or that they were in some privity with the established manufacture of safes which the public already knew and liked. To convey that notion would be a fraud, and would have to be stopped. Therefore, such *names and phrases could be used only if so explained that they would not deceive.*

"The principle of the duty to explain is recognized in *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118. It is not confined to words that can be a trademark in a full sense. The name of a person or a town may have become so associated with the particular product that the mere attaching of that name to a similar product without more would have all the effect of a falsehood. *Walter Baker & Co. v. Slack*, 130 F. Rep. 514. *An absolute prohibition against using the name would carry trademarks too far.* Therefore the rights of the two parties have been reconciled by allowing the use *provided that an explanation is attached.* *Singer Manufacturing Co. v. June Manufacturing Co.*, 163 U. S. 169, 200, 204, *Brinsmead v. Brinsmead*, 13 Times L.R. 3, *Reddaway v. Banham* (1896), AC 199, 210, 222, *American Waltham Watch Co. v. United States Watch Co.*, 173 Massachusetts 85, 87, *Dodge Stationery Co. v. Dodge*, 145 California 380. Of course the explanation must accompany the use as to give the antidote with the bane."

Page 560:

"We are not disposed to make a decree against the Halls personally. That against the company should be more specific. It should forbid the use of the name Hall either alone or in combination, incorporate name on safes or in advertisements *unless accompanied by information that the defendant is not the original Hall's Safe & Lock Company or its successor*, or as the case may be, that the article is not the product of the last named company or its successor. *With such explanations the defendants may use the Hall's name* and if it likes may show that they are the sons of the first Hall and brought up in their business by him and otherwise may state the facts."

See also, *Donnell v. Herring-Hall-Marvin Safe Co.*, 208 U. S. 267, 272, 273:

"There is nothing to show that while that company was going the sons of Joseph L. Hall could not have set up in business as safe makers *under their own name*, subject only to the duty not to mislead the public into supposing when it bought from them that it was buying their father's safes."

Page 274:

"A further argument was based on the confusion produced by the petitioner through his use of signs and advertisements calculated to make the public think that his concern was the successor of the first corporation and otherwise to mislead. This confusion must be stopped so far as it has not been by the decree in force, and it will be. *But it is no sufficient reason for taking from the Hall's the right to continue the business to which they were bred and to use their own name in doing so.* An injunction against using any name, mark or advertisement indicating

that the plaintiff is the successor of the original company, or that its goods are the product of that company, or its successors or interfering with the good will bought from it, will protect the right of the Herring-Hall-Marvin Company *and is all that it is entitled to demand.*”

In the *Howe Scale Company* case the plaintiff was manufacturing and selling typewriters; so was the defendant. In the *Brooks Clothing* case the plaintiff was selling clothes; so was the defendant. In the two *Herring-Hall-Marvin Safe Company* cases the plaintiff was manufacturing safes; so was the defendant. In *Singer v. June* the plaintiff was selling sewing machines; so was the defendant. But here, the plaintiff is not manufacturing or selling invalid wheel chairs and walkers, and likewise the defendant is not manufacturing or selling resuscitators and oxygenators. The goods of the plaintiff and defendant are radically different from each other, have different potential customers, different competitors, and different trades, save and except hospitals and hospital supply houses, which deal in and use virtually every product designed to ameliorate human ailments.

Use on Defendant's Wheel Chairs and Walkers.

In describing the use of the initials “E & J” on defendant's wheel chairs at the top of page 3 of the present opinion, this court neglects to mention that on the side of the chair there appears a paper label on which is depicted the shield previously described having “E” in the upper left-hand corner, “J” in the lower right-hand corner, illustrations of wheel chairs in the remaining corners and the full name of defendant written across the middle. This paper label is removable, it is true. However, it is applied to

defendant's wheel chairs so that defendant's wheel chairs can be readily distinguished from those of defendant's competitors when a group of wheel chairs are lined up in a row on a display room floor. Invalids are frequently sensitive as to their infirmities, and to avoid having their wheel chairs serve as moving advertisements of the manufacturer during continued use, the paper label is removable. However, at the time of selection and purchase the label bearing defendant's shield is present on the wheel chairs for the purpose of branding and distinguishing defendant's wheel chairs from those of competitors arranged in a row.

The injunction ordered in the opinion apparently permits the defendant's use of the mark "E-J" on its invalid wheel chairs as identification of the product only

"but provided that when it is so used the mark be accompanied by the full corporate name and address *immediately next to or incorporated in the mark itself.*"

We interpret this to signify that the use of defendant's paper label, above described, on the wheel chair is a proper use, and if so, we believe that the opinion should not only mention the label but indicate that it is proper.

The remaining problem, however, concerns the interpretation of the words "*immediately next to or incorporated therein.*" On the footrests "E-J" appears on the upper side. The full name of the defendant appears on the under side. The actual spacing between the initials and the full name is merely the thickness of the metal of the footrest at this point, probably not exceeding $\frac{1}{4}$ inch. Measured around the periphery of the footrest the distance is somewhat greater. Is this use of the defendant

in compliance with or in violation of the terms of the injunction to be issued, bearing in mind that although the initials and the name are on opposite sides of the footrest, that the footrest is intentionally pivotally mounted on the chair so that it can be swung up into vertical position on entering or leaving the chair?

Defendant's name plate carrying defendant's full name and street address is permanently attached to the X-brace. The spacing of the name plate from the footrests on which the initials appear does not exceed $1\frac{1}{2}$ feet. Does this use of the full corporate name and address constitute having the "full corporate name and address *immediately* next to * * * the mark itself"?

We believe that the injunction, if any, to be issued here should compare favorably with that entered in *Singer Manufacturing Company v. June Manufacturing Company*, 163 U. S. 169. Therein, it was determined that although the circulars issued by the defendant adequately indicated that the defendant was the manufacturer of the sewing machines involved, on the machines themselves there was no adequate disclosure of the source of manufacture. As said in the opinion, page 200:

"On the second question, the proof also is clear that there was an entire failure on the part of the defendant to accompany the use of the word 'Singer' on the machines made and sold by him with sufficient notice of their source of manufacture to prevent them from being bought as machines made by the Singer Manufacturing Company and thus operate an injury to private rights and a deceit upon the public. Indeed, not only the acts of omission in this regard but the things actually done give rise to the overwhelming implication that the failure to point to the origin of manufacture was intentional, and that the system of mark-

ing pursued by the defendant had the purpose of enabling the machines to be sold to the general public as machines made by the Singer Company.”

The injunction order reads as follows:

“Second, also perpetually enjoining the defendant from marking upon sewing machines or upon any plate or device connected therewith or attached thereto the word ‘Singer’ or words or letters equivalent thereto, without clearly and unmistakably specifying in connection therewith that such machines are the product of the defendant or other manufacturer and therefore not the product of the Singer Manufacturing Company.”

Although defendant’s identification of himself as the manufacturer was held to be insufficient in that case, the injunction did not require the defendant to apply its full corporate name and address, “immediately next to or incorporated in the mark itself,” but instead, merely made it incumbent upon the defendant to

“clearly and unmistakably specify (ing) in connection therewith that such machines are the product of the defendant or other manufacturer and therefore not the product of the”

plaintiff.

We think that the court here should indicate what, if anything, it regards as being a wrongful marking by the defendant with respect to Exhibit A. If nothing is wrongful the action should fail. At all events, the injunction should not go farther than that in *Singer v. June*, *supra*, which merely requires the defendant to clearly and unmistakably indicate on the chair itself that the defendant, and therefore, not the plaintiff is the manufacturer.

The Case Should Be Dismissed for Failure of Proof.

We have undertaken to point out in considerable detail that the defendant is fairly and honestly using the initials of its own name on its own products. While defendant has used the initials "E & J" it has always closely associated therewith an explanation in one form or another that the "E & J" as used in its advertising and on its products signifies Everest & Jennings, Inc., and therefore not the plaintiff, E & J Manufacturing Company.

It cannot truthfully be said that the mistake made by Hospital Progress was due to the fact that "E & J" appeared on the footrests of the defendant's wheel chairs. It cannot truthfully be said that this mistake was occasioned by the use of the initials "E & J" in the advertising of defendant where defendant's full name and street address has consistently appeared. Likewise, misaddressed mail cannot be attributed to the defendant's use of "E & J" on its wheel chairs or in its advertising. Instead, it is more readily attributable to mere carelessness and inattentiveness by the addresser of the mail.

Corporations as well as individuals can acquire nicknames and develop goodwill affiliated therewith. Thus, General Electric Company is frequently referred to as "GE"; Radio Corporation of America is frequently referred to by its initials "RCA"; Pacific Gas & Electric Company in the San Francisco Bay area is commonly designated as "PG&E." Aluminum Corporation of America is frequently referred to as merely "ALCOA." The Atchison, Topeka & Santa Fe Railway is commonly designated merely as the "Santa Fe." The Southern Pacific Railway is frequently referred to as merely the "SP." In connection with the Southern Pacific it is interesting to note that although this railroad is commonly referred to

by its initials "SP" it does not have these initials for its symbol on the New York Stock Exchange, the initials "SP" being used by South Penn Oil Company on the American Stock Exchange.

That a corporation as well as an individual may acquire a nickname in the form of its initials, see *Great Atlantic & Pacific Tea Company v. A & P Radio Stores*, 20 Fed. Supp. 703, 705:

"It is obviously impossible for a corporation having a name as long as that of the plaintiff to prevent the public from shortening it or using its initials as a nickname. This is a very wide practice particularly in connection with large enterprises such as railroads. Thus in Philadelphia the Philadelphia Rapid Transit Company which operates the local street railways is universally referred to as the PRT. Furthermore, the adoption and use by the public of such a nickname as a trade name is unquestionably of real value to the company."

In the present case the adoption and use by the public or the wheel chair trade of the nickname "E & J" is likewise of real value to the defendant and as long as the defendant in its activities has been careful to indicate that "E & J" in connection with wheel chairs signifies the defendant and not the plaintiff, no fraud or deceit has been committed.

We think that the facts of this case are closely comparable with *Lerner Stores Corporation v. Lerner* (C. C. A. 9), 162 F. 2d 160, 73 U. S. P. Q. 524. Therein, the defendant's activities are described as follows:

"Appellee, Wilfred A. Lerner, during May 1944, ran a series of advertisements in the morning and evening newspapers of San Jose advising that he was

opening a store to be known as 'Lerner's,' and after the store had been in operation for approximately one week appellee ran an advertisement in the same papers expressing appreciation for the acceptance of the new store and closed the advertisement with the words, 'as always—Lerner's.' This was appellee's first venture in the sale of feminine wearing apparel at retail and his first business to be established in San Jose.

"Approximately six weeks after appellee opened his store appellant wrote him a letter protesting his use of the name 'Lerner's' and appellee immediately set about making additions to the name so as to avoid confusion in the minds of the customers. Appellee used a continuous script type for his advertising and store front modeled on his own handwriting, which style of lettering differed in every material respect from the arrangement, lettering and text of appellant's store front, and the advertising used by appellee was so arranged as to convey to the public the information that he dealt in merchandise of a generally higher quality and price than 'Lerner Shops.' Appellee also dropped the apostrophe S ('s), added his given name 'Wilfred' and the words, 'Home Owned.'

"The underlying questions are, Did the use of the name 'Lerner,' by appellee, lead the public to understand that his goods were the goods of appellant 'Lerner Shops'? (of which there were 181 stores located in forty-one states)."

A different panel of this court concluded:

"Third: In support of its contention that it is entitled to the relief sought appellant cites inter alia, *Waterman Pen Co. v. Modern Pen Co.*, 235 U. S. 88, and *Horlick's Malted Milk v. Horluck's Inc.*, 59 F. 2d 13, CCA 9.

“In the instant case the appellee took the ‘reasonable precautions’ which the court decided were necessary in the case of *Waterman Co. v. Modern Pen Co.*, supra. Further, there is an entire absence of a showing of fraud. It was to ‘prevent a fraud’ that the injunction was granted in the *Waterman* case, supra.

“In *Horlick’s* case, supra, we said:

“‘But where a personal name has been associated in the minds of the public with certain goods or a particular business, it is the duty of a person with the same or similar name, subsequently engaged in the same or similar business or dealing in like goods, *to take such affirmative steps as may be necessary to prevent his goods or business from becoming confused with the goods or business of the established trader.*’ (Emphasis supplied; 59 F. 2d 15.)

“In this case such steps were taken.

“Appellant cites numerous cases such as *Brooks Bros. v. Brooks Clothing of California*, 60 F. Supp. 442 (D. Ct., S. D. Cal.) affirmed per curiam, 158 F. 2d 798, cert. den., May 12, 1947, where defendant made false radio advertising claims designed to create confusion between itself and plaintiff; and *Stewart’s Sandwiches, Inc. v. Seward’s Cafeteria*, 60 F. 2d 981 (D. Ct., S. D. N. Y.), where defendant, who had never before conducted a cafeteria, advertised his first venture as, ‘Coming Soon! Another Seward’s Cafeteria.’

“The element of false advertising or other conduct designed to mislead the public or cause confusion which was controlling in the cited cases, is absent here.

“In *Sweet Sixteen Co. v. Sweet ‘16’ Shop, Inc.*, 15 F. 2d 920, CCA 8, plaintiff with stores on the Pacific Coast had advertised its business extensively in newspapers in Utah and elsewhere. Defendant opened

a 'wholly similar' business, and there numerous instances appeared wherein dealers and customers were actually misled into mistaking defendant's business for plaintiff's. The advertising by the company in Utah reached a large number of its inhabitants. These differences sufficiently distinguished this case from that of Sweet-Sixteen Co. v. Sweet '16' Shop, Inc., *supra*.

"Some of the cases cited by appellant refer to the name of a product. Here the name is of an establishment. The principle of protection is identical but the area of protection where the name of an establishment is concerned will be more circumscribed and if the establishment is not operating in the same territory no unfair competition exists."

Likewise here, the element of false advertising or other conduct on the part of this defendant to mislead the public or cause confusion is entirely absent in correspondence, in catalogs, in advertising and on the wheel chairs themselves. As different panels of this court seem to take different views of the law in cases involving comparable circumstances, defendant avails itself of the provision of Rule 23 of suggesting that a rehearing be granted *en banc*.

When we compare the statement in the *Lerner* case

"The element of false advertising or other conduct designed to mislead the public or cause confusion which was controlling in the cited cases is absent here"

with the statement made by this court on page 9 of its opinion

"No conscious design to deceive the public has been shown here, and there is no evidence that the public has been deceived even innocently"

it is difficult to understand why opposite results should be reached. Lerner was not enjoined from using the name Lerner or any colorable imitation thereof in connection with his correspondence, advertising, catalogs, and any other form of sales promotion. Neither should be the defendant.

Conclusion.

We respectfully submit:

(1) The fact that the corporate name of the defendant is derived from the partnership that preceded it, and was derived from the family names of those who caused the corporation to be formed for the purpose of raising capital and exploiting the invention to which Everest and Jennings, as individuals, had devoted their entire time, is an important and relevant consideration. It is not irrelevant as indicated by the present opinion.

(2) Correspondence, catalogs, advertising, and promotional material have not been shown herein to be wrongful in their makeup. The nature of the correspondence, catalogs, and advertising and promotional material heretofore used by the defendant with its self-imposed restraints, has not even been mentioned in the opinion nor criticized nor condemned therein. If defendant's correspondence, catalogs, advertising, and promotional material is not wrongful, and the use of the initials "E & J" therein has always been boldly accompanied by the full corporate name and address of the defendant, use of the defendant's initials with such self-imposed restraints should be permitted—not completely and forever enjoined as by the present opinion.

(3) The present opinion in denying the defendant the right to all use whatsoever of the initials "E & J" in correspondence, catalogs, advertising and promotional material but at the same time permitting the limited use of the initials on the wheel chairs themselves, is apt to result in greater confusion. If defendant is to be permitted the limited use of the initials on the wheel chairs themselves should not defendant be permitted to inform the public by way of correspondence, catalogs, advertising, and promotional material in advance of purchase that their wheel chairs can be thus identified at the time of purchase. A purchaser confronted with initials on the chair *for the first time* at the time of purchase would have reason to wonder whether they were of defendant's manufacture, or were the manufacture of someone else such as the plaintiff. All avenues of communication to the public and to the trade as to how defendant's wheel chairs are identified from those of competitors should be left open, and if defendant's chairs are to be branded in the manner indicated in the opinion, defendant should be able to so inform the public and the trade by correspondence, catalogs, advertising and promotional material. To deny the defendants the right to inform the public by advertising and catalogs as to how the wheel chair actually appears and is branded appeals to us as being most unrealistic.

(4) Use of the symbols "E-J" on defendant's wheel chairs and walkers themselves has always been accompanied by the full name and address of the defendant—if not immediately adjacent thereto—at least reasonably close thereto. The court in the present opinion does not indicate which of the present uses of the initials on defendant's wheel chairs is wrong-

ful and which are permissible. We do not think any of them are wrongful, but if the court disagrees and indicates which uses it regards as not already having adequate self-imposed restraints, correction can be readily made.

(5) There is a well recognized distinction between *damnum absque injuria* and enjoicable damage. Where defendant's activities indicate a design to acquire some of plaintiff's business or to mislead the public, these activities can be enjoined. But where the defendant's activities indicate no design on the part of the defendants to acquire plaintiff's business or to mislead the public, as here, but to merely exploit the defendant's own name by way of abbreviation, then such confusion as may arise is *damnum absque injuria* and is not actionable.

Defendant, here, has not and cannot possibly deprive plaintiff of any business because the goods of the parties are so radically different. Defendant could not possibly fill an order for plaintiff's goods, nor vice versa. Misaddressed orders have consequently been referred by both parties to the proper party. Furthermore, the public has not been misled. Its misaddressed mail is not as a result of confusion, but is a result of carelessness. Defendant has made and makes no effort to obtain a "free ride" on plaintiff's reputation. It merely seeks to develop and protect its own and inform the public wherever and whenever possible that "E & J" when used on or in reference to wheel chairs signifies those of defendant's manufacture and not those of any other competitor in the wheel chair industry or goods of the plaintiff.

You are, therefore, respectfully petitioned to grant a rehearing.

Respectfully submitted,

FRED H. MILLER,

ALLAN D. MOCKABEE,

By FRED H. MILLER,

Attorneys for Everest & Jennings, Inc.

Certificate of Counsel.

I, FRED H. MILLER, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

FRED H. MILLER,

Attorney for Petitioner.

**United States
Court of Appeals**
for the Ninth Circuit

C. H. TROWLER, Doing Business as Standard
Maps,

Appellant,

vs.

M. PENN PHILLIPS and M. PENN PHILLIPS,
Doing Business as M. Penn Phillips, Associates;
WESTERN WOODS ASSOCIATES, WIL-
LIAM HARWICK, JOHN KAGAN and
BERT B. BRANT, Doing Business as Har-
wick, Kagan & Brant; FRED W. AUSTIN,
WILLIAM R. BLUMFIELD and HAROLD
W. SIEDE, Copartners, Doing Business as In-
dustrial Lithographers,

Appellees.

Transcript of Record

**Appeals from the United States District Court for the
Southern District of California
Central Division**

FILED

No. 15923

United States
Court of Appeals
for the Ninth Circuit

C. H. TROWLER, Doing Business as Standard
Maps,

Appellant,

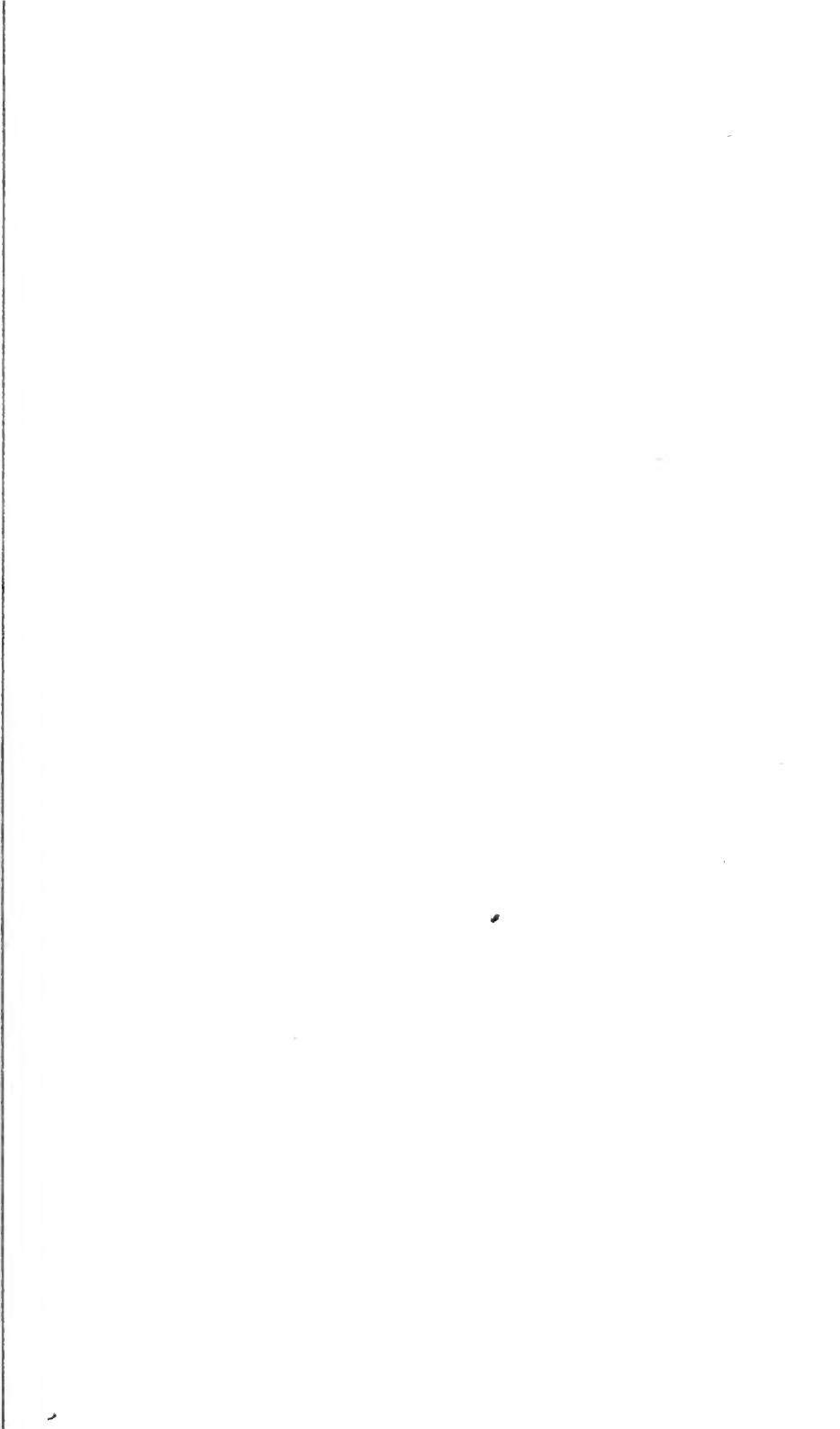
VS.

M. PENN PHILLIPS and M. PENN PHILLIPS,
Doing Business as M. Penn Phillips, Associates;
WESTERN WOODS ASSOCIATES, WIL-
LIAM HARWICK, JOHN KAGAN and
BERT B. BRANT, Doing Business as Har-
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Appeals from the United States District Court for the
Southern District of California
Central Division



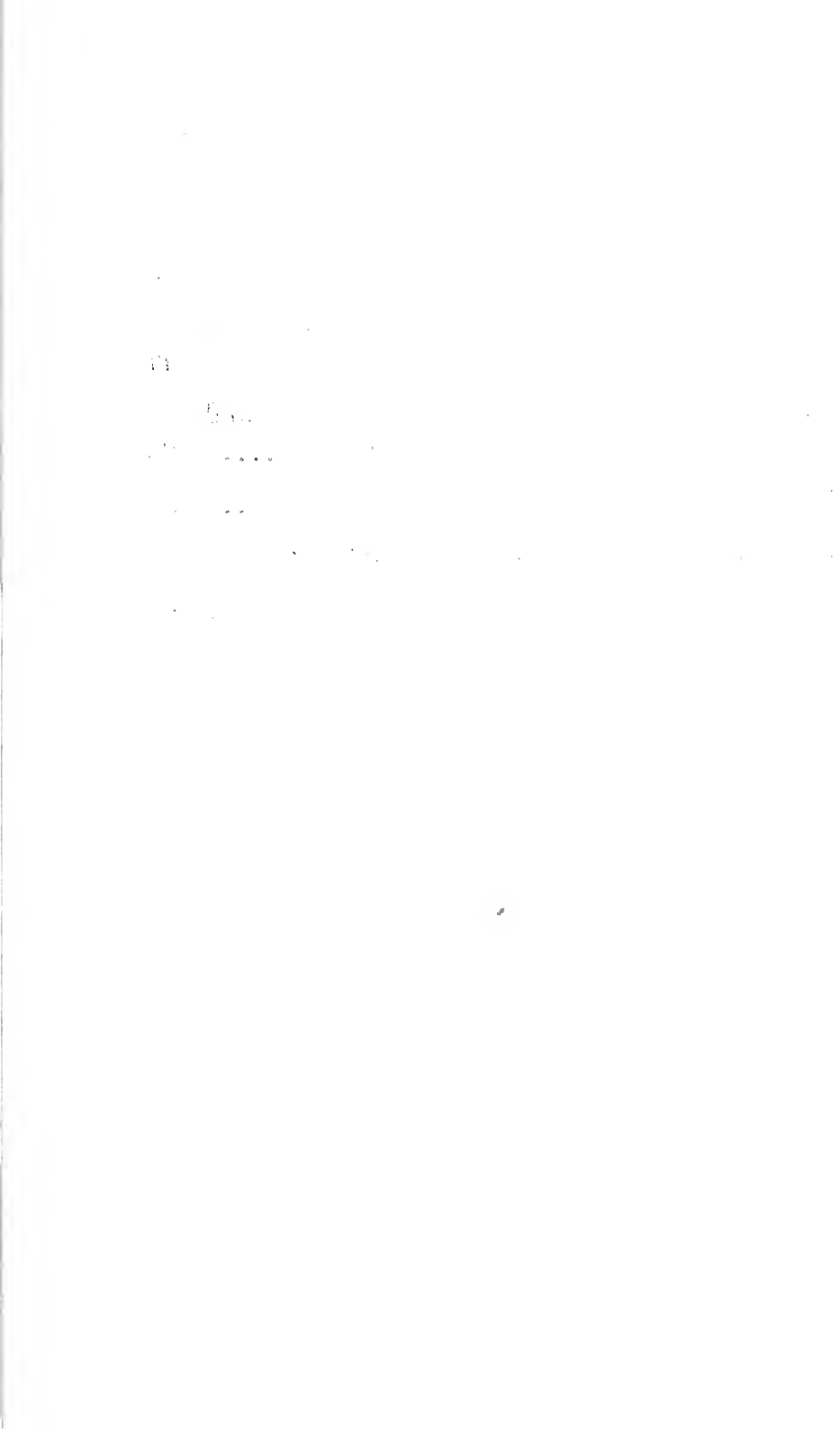
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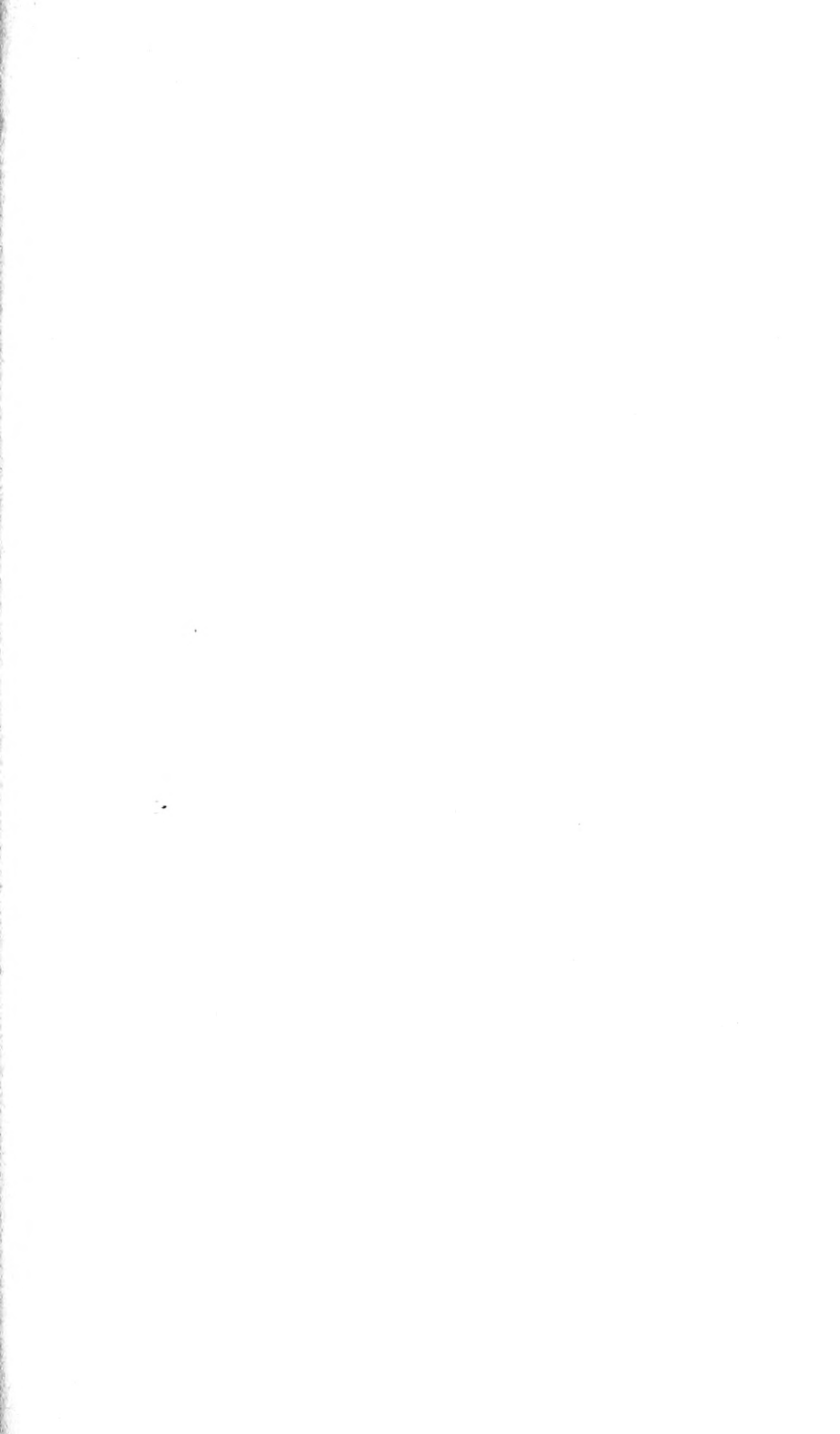
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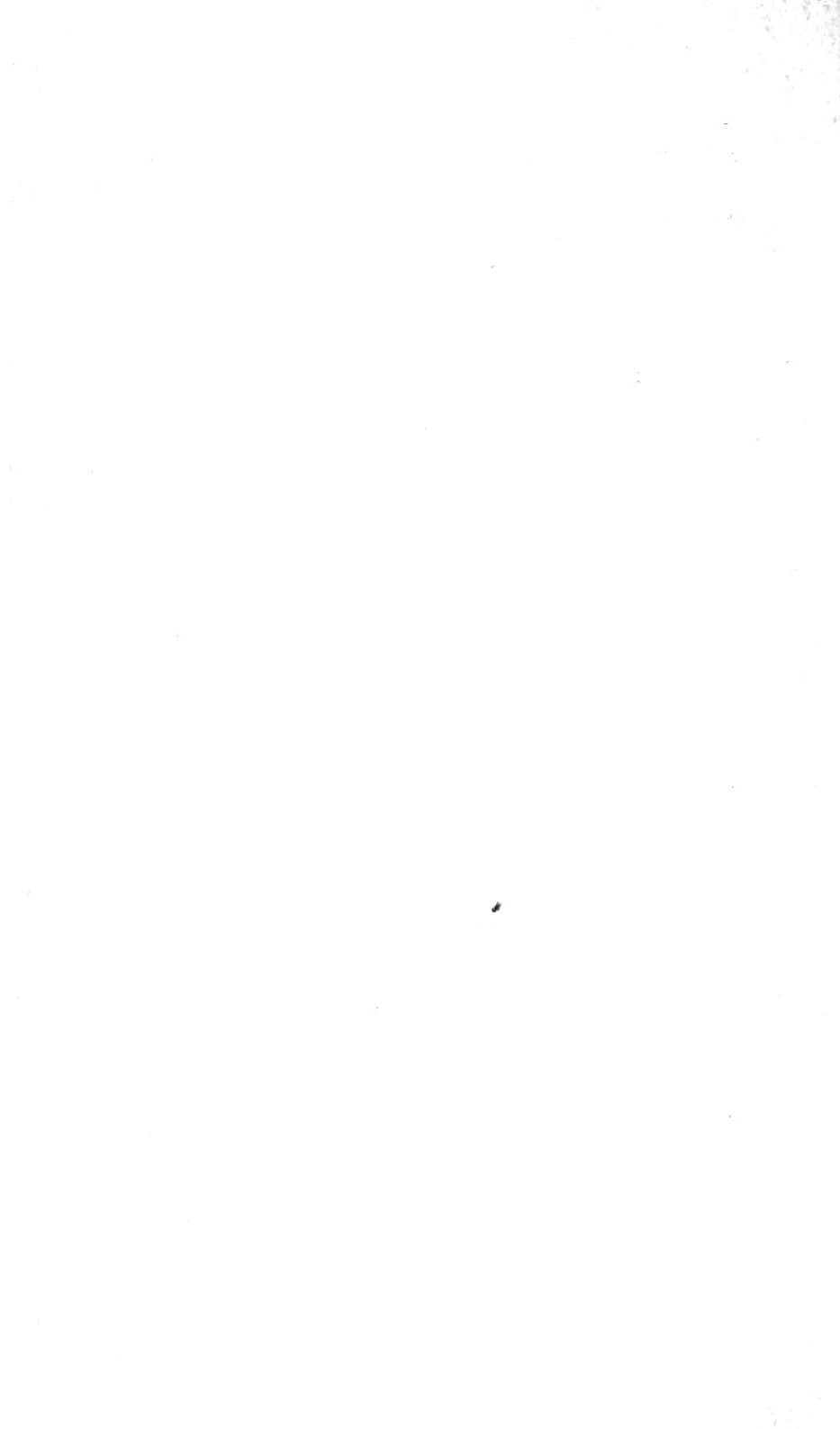
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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

~~C. H. TROWLER,~~
MELVILLE B. NIMMER,
233 So. Beverly Drive,
Beverly Hills, California.

For Appellees:

PORTER C. BLACKBURN,
GEORGE R. MAURY,
224 E. Olive Ave.,
Burbank, California,
For Appellees, Fred W. Austin, et al.,
Case No. 179-57-HW;

KAPLAN, LIVINGSTON, GOODWIN AND
BERKOWITZ,
FRANK MANKIEWICZ,
270 N. Canon Drive,
Beverly Hills, California,
For Appellees, Western Woods Assoc.,
Case No. 211-57-HW;

JACOB W. SILVERMAN,
8330 West 3rd Street,
Los Angeles 48, California,
For Appellees, Wm. Harwick, et al.,
Case No. 219-57-HW;

HOUSTON A. SNIDOW,
118 East Foothill Boulevard,

BISHOP MOORE,
1111 W. Foothill Blvd.,
Azusa, California,
For Appellees, M. Penn Phillips, et al.,
Case No. 221-57-HW.



In the United States District Court, Southern
District of California, Central Division

Civil Action No. 211-57-HW

C. H. TROWLER, d/b/a Standard Maps,

Plaintiff,

vs.

WESTERN WOODS ASSOCIATES,

Defendants.

COMPLAINT FOR INFRINGEMENT
OF COPYRIGHT

I.

This is a suit brought for infringement of Copyrights duly granted under the Statutes of the United States upon maps, of which Plaintiff is the author and proprietor, and the jurisdiction of this Court is invoked under the Copyright Laws of the United States, Title 17, United States Code.

II.

The Plaintiff is a resident of the County of Los Angeles, State of California.

III.

The Defendants, Western Woods Associated, are citizens of the [5*] State of California, and reside in Los Angeles County, in said State, doing business under the firm name of Western Woods Associates.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

IV.

Prior to January 3, 1956, and June 28, 1956, Plaintiff who then was a subject of the Queen of Great Britain, and who, prior to October 12, 1956, was and ever since has been a citizen of the United States, created and authored original maps entitled Hesperia. The said maps contain a large amount of material wholly original with Plaintiff and are copy-rightable subject matter under the laws of the United States.

V.

Between the dates of January 3 and February 6, 1956; June 28 and August 20, 1956; and October 12 and December 7, 1956, Plaintiff complied in all respects with Title 17, U.S.C., No. 13, and all other laws governing Copyright, and secured the exclusive rights and privileges in and to the Copyright of said maps and received from the Register of Copyrights, Certificates of Registration dated and identified as follows:

February 6, 1956,
Class FF,
Registration No. 20463;

August 20, 1956,
Class FF,
Registration No. 21586;

December 7, 1956,
Class FF,
Registration No. 22265. [58]

VI.

Since the dates of February 6, 1956; August 20, 1956; and December 7, 1956, said maps have been published by Plaintiff, and all copies of it made by Plaintiff and under his authority or license have been printed and published in strict conformity with the provisions of Title 17, U.S.C., No. 13, and all other laws governing Copyright.

VII.

Since the dates of February 6, 1956; August 20, 1956, and December 7, 1956, Plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the Copyrights in said maps.

VIII.

After February 6, 1956; August 20, 1956, and December 7, 1956, Defendants, and each of same, have infringed said Copyrights by publishing and placing upon the market maps entitled *Hesperia*, which were copied largely from Plaintiff's Copyrighted maps entitled *Hesperia*.

IX.

Copies of Plaintiff's Copyrighted maps are hereto attached as Exhibit 1, Exhibit 2, and Exhibit 3, and copies of Defendants' infringing maps are attached hereto as Exhibit 4 and Exhibit 5.

X.

Plaintiff has notified the Defendants, and each of same, that the said Defendants have infringed the

Copyrights of Plaintiff, and Defendants have continued to infringe the said Copyrights.

Wherefore, Plaintiff Demands:

1. That the Defendants, jointly and severally, their agents and servants, be enjoined during the pendency of this action, and permanently, [59] from infringing said Copyrights of Plaintiff in any manner;

2. That the Defendants, jointly and severally, be required to pay to Plaintiff such damages as Plaintiff has sustained in consequence of Defendants' infringement of said Copyrights, and to account for and pay over to Plaintiff all the gains, profits and advantages derived by Defendants from his or their infringement of Plaintiff's Copyrights, or such damages as to the Court will appear proper within the provisions of the Copyright Statutes but not less than Two Hundred Fifty Dollars (\$250.00);

3. That the defendants, jointly and severally, be required to deliver up, to be impounded during the pendency of this action, all copies in their possession or under their control, infringing said Copyrights, and to deliver up for destruction all infringing copies, and the plates, molds, and other matter for making said infringing copies;

4. That the Defendants, jointly and severally, pay to Plaintiff the costs of this action and reasonable attorney's fees to be allowed to the Plaintiff by the Court;

5. That Plaintiff have such other and further relief as is just.

Respectfully,

C. H. TROWLER,

By /s/ ALAN FRANKLIN,
Attorney for Plaintiff.

Los Angeles, California, February 7, 1957.

[Endorsed]: Filed February 7, 1957. [60]

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 219-57-HW

C. H. TROWLER, d/b/a Standard Maps,

Plaintiff,

vs.

WILLIAM HARWICK, JOHN KAGAN and
BERT B. BRANT, d/b/a Harwick-Kagan-
Brant,

Defendants.

COMPLAINT FOR INFRINGEMENT
OF COPYRIGHT

I.

This is a suit brought for infringement of Copyrights duly granted under the Statutes of the United States upon maps of which Plaintiff is the author

and proprietor, and the jurisdiction of the Court is invoked under the Copyright Laws of the United States, Title 17, United States Code.

II.

The Plaintiff is a resident of the County of Los Angeles, State of California.

III.

The Defendants, William Harwick, John Kagan, and Bert B. Brant, co-partners, are citizens of the State of California, and reside in Los Angeles County, in said State, doing business under the firm name of [98] Harwick-Kagan-Brant.

IV.

Prior to January 3, 1956, and June 28, 1956, Plaintiff who then was a subject of the Queen of Great Britain, and who, prior to October 12, 1956, and ever since has been a citizen of the United States, created and authored original maps entitled *Hesperia*. The said maps contain a large amount of material wholly original with Plaintiff and are copy-rightable subject matter under the laws of the United States.

V.

Between the dates of January 3 and February 6, 1956; June 28 and August 20, 1956; and October 12 and December 7, 1956, Plaintiff complied in all respects with Title 17, U.S.C., No. 13, and all other laws governing Copyright, and secured the exclusive rights and privileges in and to the Copyright of said

maps and received from the Register of Copyrights, Certificates of Registration dated and identified as follows:

February 6, 1956,
Class FF,
Registration No. 20463;

August 20, 1956,
Class FF,
Registration No. 21586;

December 7, 1956,
Class FF,
Registration No. 22265.

VI.

Since the dates of February 6, 1956; August 20, 1956; and [99] December 7, 1956, said maps have been published by Plaintiff, and all copies of it made by Plaintiff and under his authority or license have been printed and published in strict conformity with the provisions of Title 17, U.S.C., No. 113, and all other laws governing Copyright.

VII.

Since the dates of February 6, 1956; August 20, 1956, and December 7, 1956, Plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the Copyrights in said maps.

VIII.

After February 6, 1956; August 20, 1956, and December 7, 1956, Defendants, and each of same, have

infringed said Copyrights by publishing and placing upon the market maps entitled *Hesperia*, which were copied largely from Plaintiff's Copyrighted maps entitled *Hesperia*.

IX.

Copies of Plaintiff's Copyrighted maps are hereto attached as Exhibit 1, Exhibit 2, and Exhibit 3, and a copy of Defendants' infringing map is attached hereto as Exhibit 4.

X.

Plaintiff has notified the Defendants, and each of same, that the said Defendants have infringed the Copyrights of Plaintiff, and Defendants have continued to infringe the said Copyrights.

Wherefore, Plaintiff demands:

1. That the Defendants, jointly and severally, their agents and servants, be enjoined during the pendency of this action, and permanently, from infringing said Copyrights of Plaintiff in any [100] manner;

2. That the Defendants, jointly and severally, be required to pay to Plaintiff such damages as Plaintiff has sustained in consequence of Defendants' infringement of said Copyrights, and to account for and pay over to Plaintiff all the gains, profits and advantages derived by Defendants from his or their infringement of Plaintiff's Copyrights, or such damages as to the Court will appear proper within the provisions of the Copyright Statutes but not less than Two Hundred Fifty Dollars (\$250.00);

3. That the Defendants, jointly and severally, be required to deliver up, to be impounded during the pendency of this action, all copies in their possession or under their control, infringing said Copyrights, and to deliver up for destruction all infringing copies, and the plates, molds, and other matter for making said infringing copies;

4. That the Defendants, jointly and severally, pay to Plaintiff the costs of this action, and reasonable attorney's fees to be allowed to the Plaintiff by the Court;

5. That Plaintiff have such other and further relief as is just.

Respectfully,

C. H. TROWLER,

By /s/ ALAN FRANKLIN,

Attorneys for Plaintiff.

Los Angeles, California, February 8, 1957.

[Endorsed]: Filed February 8, 1957. [101]

[Title of District Court and Cause.]

Docket No. 219-57-HW

ANSWER OF DEFENDANTS, WILLIAM HARWICK, JOHN KAGAN & BERT B. BRANT

Defendants William Harwick, John Kagan and Bert B. Brant jointly, individually and as co-part-

ners, doing business as Harwick, Kagan & Brant for themselves and each of them admit, deny and allege as follows:

I.

That Defendants and each of them have no information or belief on the subjects sufficient to enable them and each of them to answer the allegations contained in Paragraphs 1, 2, 4, 5 and 6 thereof, and, placing their respective denials on said grounds, deny generally and specifically each and every allegation of said Paragraphs.

II.

That Defendants and each of them deny generally and specifically each and every allegation contained in Paragraphs 7, 8, 9 and 10 except that they admit that attached to the complaint, which was served upon Defendant [103] John Kagan, were two documents marked Exhibit 1 and Exhibit 4 (missing).

And as Separate, Distinct and Affirmative Defenses,
Defendants and Each of Them Do Herewith
Allege:

First Defense: That said alleged maps described in plaintiff's Complaint are not of original, special, unique, extraordinary or unusual creation or design, but actually are of common, ordinary and usual creation or design. That said alleged maps are within the realm of public domain. That by reason of the foregoing premises, said alleged maps are not the proper subject matter of copyright.

Second Defense: That plaintiff's said alleged respective copyrights are null and void by reason that same are infringements of various copyrights previously granted to persons other than plaintiff.

Third Defense: That plaintiff's said alleged respective copyrights are null and void by reason that same are infringements of various copyrights previously held by persons other than plaintiff, by virtue of the creation, design and exploitation of said alleged respective creation or design by said other persons.

Fourth Defense: That Plaintiff's alleged copyrighted maps as set forth in Paragraph 9 of the Complaint were authored by a person or entity other than Plaintiff. That the beneficial and actual title to said alleged copyrighted maps is not vested in Plaintiff but is in fact vested in an outside party or entity. That Plaintiff has instituted this action without the consent or approval of said true owner and actually against his consent.

Fifth Defense: That by reason of the premises contained in the foregoing Second, Third and Fourth Defenses, plaintiff is in Court with unclean hands.

Wherefore, Defendants pray for judgment as follows:

1. That the complaint be dismissed and that plaintiff take nothing thereby.

2. That judgment be rendered in favor of the Defendants.

3. For Defendants' costs of suit incurred herein.

4. For such other and further relief as to the Court may appear [104] just and equitable.

Signed at Los Angeles, California, this 7th day of March, 1957.

WILLIAM HARWICK, JOHN KAGAN & BERT
B. BRANT, AS CO-PARTNERS, ETC., DO-
ING BUSINESS AS HARWICK, KAGAN
& BRANT,

Defendants;

By /s/ BERT B. BRANT.

Signed at Los Angeles, California, this 7th day of March, 1957.

/s/ JACOB W. SILVERMAN,
Attorney for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 8, 1957. [105]

[Title of District Court and Cause.]

No. 211-57-HW

ANSWER AND COUNTERCLAIM

Defendant Western Woods of Hesperia, a limited partnership, erroneously sued and served herein as

Western Woods Associates, admits, denies and alleges as follows:

I.

Answering Paragraph I of the Complaint, Defendant denies that Plaintiff is either the author or the proprietor of the maps shown in the exhibits attached to the Complaint.

II.

Defendant has no information or belief sufficient to enable it to answer the allegation in Paragraph II of the Complaint and placing its denial on the grounds of such lack of information or belief denies generally and specifically each and every allegation of said Paragraph.

III.

Answering Paragraph III of the Complaint, Defendant alleges [62] that it is a limited partnership, duly qualified under the laws of the State of California, doing business under the name of Western Woods of Hesperia. That N. K. Mendelsohn is the General Partner thereof, and that the following-named individuals are Limited Partners: Henry R. Mason, Dorothea Findlay, Frank L. Bret, John Hislop, Emanuel Mendelsohn, Donald Savage, William A. Leonard, Barney Bernstein, Charles M. Ross and Harvey Weeks. Except as herein admitted, Defendant denies each and every allegation contained in said Paragraph.

IV.

Answering Paragraph IV of the Complaint, Defendant has no information or belief on the subject

of Plaintiff's citizenship, past or present, sufficient to enable it to answer that part of Paragraph IV relating to said citizenship and placing its denial on the grounds of such lack of information or belief, denies generally and specifically each and every allegation pertaining to Plaintiff's citizenship. Defendant denies each and every allegation, other than those dealing with Plaintiff's citizenship, contained in Paragraph IV of the Complaint.

V.

Answering Paragraph V of the Complaint, Defendant alleges that it has no information or belief on the subject of Plaintiff's compliance with registration requirements of the Copyright Act sufficient to enable it to answer the allegation regarding copyright contained in said Paragraph, and placing its denial on the grounds of such lack of information or belief, denies generally and specifically each and every allegation of said Paragraph. Defendant further alleges that if any valid copyrights or copyright protection were obtained by Plaintiff on the dates alleged by Plaintiff in Paragraph V, or at any other time, they were so obtained for, and in trust for, and for the benefit of the Defendant, who is the author of the maps set forth in Exhibits 1 through 5. [63]

VI.

Answering Paragraph VI of the Complaint, Defendant has no information or belief sufficient to enable it to answer the allegations therein contained and placing its denial on the grounds of such lack

of information or belief, denies generally and specifically each and every allegation of said Paragraph.

VII.

Answering Paragraph VII of the Complaint, Defendant denies generally and specifically each and every allegation of said Paragraph.

VIII.

Answering Paragraph VIII of the Complaint, Defendant admits that it has published maps entitled *Hesperia*, and except as herein expressly admitted, denies each and every allegation of Paragraph VIII.

IX.

Answering Paragraph IX of the Complaint, Defendant admits that three printed brochures marked Exhibit 1, Exhibit 4 and Exhibit 5 were attached to the copy of the Complaint served upon Defendant, and that two printed brochures marked "Exhibit 2" and "Exhibit 3" were mailed by Plaintiff's attorney to Defendant's attorney on March 15, 1957. Except as herein expressly admitted, Defendant denies each and every allegation of Paragraph IX.

X.

Answering Paragraph X of the Complaint, Defendant denies generally and specifically each and every allegation of said Paragraph.

For Separate, Distinct and Affirmative Defenses,
Defendant Alleges:

First Defense

That the maps identified as part of the Exhibits 1 through 5, attached to the Complaint, are neither original, special, unique, extraordinary, nor of unusual creation or design, but are common, ordinary and of usual creation and design and were compiled from [64] and copied from other maps which were at the time of said compilation and copying in the public domain and by reason of the foregoing, said maps are not the proper subject matter for copyright.

Second Defense

That at all times mentioned in the Complaint, Plaintiff was an employee of Defendant, that Defendant employed Plaintiff in many capacities, including that of map maker, that all of the maps involved in this action to the extent that they were created by Plaintiff, were created by him for hire at the special instance and request of Defendant and that Defendant has previously paid Plaintiff, in full, for all work done by him involving the creation of said maps, as an employee of Defendant. At no time mentioned in the Complaint, or since, has Defendant ever authorized Plaintiff, directly or indirectly, to obtain a copyright on the maps in his own name, nor has Defendant at any time assigned, or in any way transferred any of its rights as the author of said maps to Plaintiff or any other person.

Third Defense

Defendant is the true owner and author of the said maps. Plaintiff's attempts, if any, to copyright them in his own name and obtain for himself the protection of the Copyright Act constitute an infringement and usurpation of the rights of Defendant.

First Counterclaim

I.

The allegations of the Second Defense above, are incorporated herein and by this reference made a part hereof as though repeated at this point in full.

II.

Defendant is informed and believes, and upon such information and belief alleges, that Plaintiff has continued to and is now publishing and selling the said maps under his own name and for his own account, without any permission having been granted therefor [65] by Defendant, and that such publication and sale by Plaintiff is being done wilfully and with full knowledge that Defendant is the author of the maps. Plaintiff has derived profits to an amount and extent unknown to Defendant but well known to Plaintiff, and that said profits have been derived from the sale of the maps by Plaintiff in violation of the rights of Defendant and have been earned by Plaintiff wilfully and with full knowledge of the rights of Defendant in the premises.

Second Counterclaim

I.

During the period from September 1, 1955, until May 24, 1956, Plaintiff was employed by Defendant from time to time to perform various maintenance and other tasks at Defendant's place of business. During this time various sums of money, totalling Four Hundred and Twenty-one Dollars and 65/100 (\$421.65) were paid to Plaintiff at the express instance and request of Plaintiff as advance payments for work which Plaintiff promised to perform for Defendant, as follows:

Work to be done	Amount
To prepare a map of part of Kern County (September 1, 1955).....	\$ 45.90
To prepare a cut-out sign (September 20, 1955)	175.00
To prepare a plastic map (February 21, 1955)	25.75
To perform certain carpentry work (May 10, 1956).....	50.00
To perform general repair and carpentry (May 24, 1956).....	125.00

II.

None of the work promised to be done by Plaintiff has been done nor has any amount of said money been returned, despite the fact that Defendant has repeatedly asked Plaintiff either to perform the work or return the money.

Wherefore, Defendant prays as follows:

1. That the complaint be dismissed and that Plaintiff take nothing thereby. [66]

2. For a declaration that if the maps in Exhibits 1 through 5 are proper subjects for copyright, any copyrights registered thereon in the name of Plaintiff were registered by Plaintiff for and in trust for Defendant.

3. For a declaration that Defendant is the author and owner of the maps in question, that Plaintiff, his agents and servants be enjoined during the pendency of this action and permanently from infringing the copyright of Defendant and from publishing, selling, marketing or otherwise disposing of any copy of the maps included in Exhibits 1 through 5.

4. That Plaintiff be required to pay to Defendant such damages as Defendant has sustained in consequence of Plaintiff's infringement of Defendant's rights in the maps, and to account for all gains, profits and advantages derived by Plaintiff by his infringement of Defendant's copyright, or such damages as to the Court shall appear proper within the provisions of the Copyright statutes, but not less than Two Hundred and Fifty Dollars (\$250).

5. For punitive damages in the amount of Five Thousand Dollars (\$5,000) by reason of Plaintiff's wilful, unconscionable and oppressive acts in violation of Defendant's rights.

6. That Plaintiff be required to deliver up to be impounded during the pendency of this action, all copies of said maps in his possession or under his control, and to deliver up for destruction all infringing copies and all plates, moulds and other matter for making such infringing copies.

7. That judgment be rendered in favor of Defendant in the amount of Four Hundred and Twenty-one Dollars and 65/100 (\$421.65), with interest thereon at the rate of seven per cent (7%) per annum from May 24, 1956.

8. That Plaintiff pay to Defendant the costs of this action and reasonable attorneys' fees to be allowed to Defendant by the Court. [67]

9. For such other and further relief as to the Court may appear just and equitable.

March 26, 1957.

KAPLAN, LIVINGSTON,
GOODWIN & BERKOWITZ,

By /s/ FRANK MANKIEWICZ,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 27, 1957. [68]

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 179-57—HW

C. H. TROWLER, Doing Business as Standard
Maps,

Plaintiff,

vs.

FRED W. AUSTIN, WILLIAM R. BLUMFIELD
and HAROLD W. SIEDE, Co-partners, Doing
Business as Industrial Lithographers; FRED
W. AUSTIN, Doing Business as Industrial
Lithographers, and FRED W. AUSTIN,

Defendants.

FIRST AMENDED COMPLAINT FOR
INFRINGEMENT OF COPYRIGHT

I.

This is a suit brought for infringement of Copy-
rights duly granted under the Statutes of the United
States upon maps, of which Plaintiff is the author
and proprietor, and the jurisdiction of this Court
is invoked under the Copyright Laws of the United
States, Title 17, United States Code.

II.

The Plaintiff is a resident of the County of Los
Angeles, State of California.

III.

The Defendants, Fred W. Austin, William R. Blumfield and Harold W. Siede, co-partners, doing business as Industrial Lithographers; Fred W. Austin, doing business as Industrial Lithographers, and Fred W. Austin, are citizens of the State [2*] of California, and reside in Los Angeles County, in said State.

IV.

Prior to January 3, 1956, and June 28, 1956, Plaintiff, who then was a subject of the Queen of Great Britain, and who, prior to October 12, 1956, was and ever since has been a citizen of the United States, created and authored original maps entitled Map of Antelope Valley Portion of Kern County-San Bernardino County. The said maps contain a large amount of material wholly original with Plaintiff and are copyrightable subject matter under the laws of the United States.

V.

Between the dates of October 24th, 1955, and February 6th, 1956, Plaintiff complied in all respects with Title 17, U.S.C., No. 13, and all other laws governing Copyright, and secured the exclusive rights and privileges in and to the Copyright of said maps and received from the Register of Copyrights, Certificate of Registration dated and identified as follows:

*Page numbering appearing at foot of page of original Certified Transcript of Record.

February 6, 1956

Class FF

Registration No. 20464

VI.

Since the dates of October 24th, 1955, and February 6th, 1956, said maps have been published by Plaintiff, and all copies of it made by Plaintiff and under his authority or license have been printed and published in strict conformity with the provisions of Title 17, U.S.C., No. 13, and all other laws governing Copyright.

VII.

Since the dates of October 24th, 1955, and February 6th, 1956, Plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the Copyrights in said maps.

VIII.

After October 24th, 1955, and February 6th, 1956, Defendants, and each of same, have infringed said Copyrights by publishing and placing upon the market maps entitled Antelope Valley, Portion of Kern County-San Bernardino County, which were copied by said defendants and each of them largely from Plaintiff's Copyrighted maps entitled Antelope Valley, Portion of Kern County-San Bernardino [3] County, without the consent of the plaintiff.

IX.

A copy of Plaintiff's Copyrighted Map is hereby attached as Exhibit 1; and copies of Defendants' in-

fringing maps are attached hereto as Exhibit 2, and Exhibit 3.

X.

Plaintiff has notified the Defendants, and each of them, that the said Defendants have infringed the Copyrights of Plaintiff, and Defendants have continued to infringe the said Copyrights.

Wherefore, Plaintiff demands:

1. That the Defendants, jointly and severally, their agents and servants, be enjoined during the pendency of this action, and permanently, from infringing said Copyrights of Plaintiff in any manner;

2. That the Defendants, jointly and severally, be required to pay to Plaintiff such damages as Plaintiff has sustained in consequence of Defendants' infringement of said Copyright, and to account for and pay over to Plaintiff all the gains, profits and advantages derived by Defendants from his or their infringement of Plaintiff's Copyright, or such damages as to the Court will appear proper within the provisions of the Copyright Statutes but not less than Two Hundred Fifty Dollars (\$250.00).

3. That the Defendants, jointly and severally, be required to deliver up for destruction all infringing copies, and the plates, molds and other matter for making said infringing copies.

4. That the defendants, jointly and severally, pay to Plaintiff the costs of this action, and reasonable attorney's fees to be allowed to the Plaintiff by the Court.

5. That Plaintiff have such other and further relief as is just.

Respectfully,

C. H. TROWLER,

By /s/ ALAN FRANKLIN,

Attorneys for Plaintiff.

Los Angeles, California, April 11, 1957.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 11, 1957. [4]

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 221-57—HW

C. H. TROWLER, Doing Business as Standard
Maps,

Plaintiff,

vs.

M. PENN PHILLIPS and M. PENN PHILLIPS,
Doing Business as M. Penn Phillips Associates,
Defendants.

FIRST AMENDED COMPLAINT FOR
INFRINGEMENT OF COPYRIGHT

I.

This is a suit brought for infringement of Copyrights duly granted under the Statutes of the United

States upon maps, of which Plaintiff is the author and proprietor, and the jurisdiction of this Court is invoked under the Copyright Laws of the United States, Title 17, United States Code.

II.

The Plaintiff is a resident of the County of Los Angeles, State of California.

III.

The Defendants, M. Penn Phillips and M. Penn Phillips, doing business as M. Penn Phillips Associates, are citizens of the State of California, and reside and are doing business in Los Angeles County, in said State.

IV.

Prior to January 3, 1956, and June 28, 1956, Plaintiff, who then [113] was a subject of the Queen of Great Britain, and who, prior to October 12, 1956, was and ever since has been a citizen of the United States, created and authored original maps entitled Hesperia. The said maps contain a large amount of material wholly original with Plaintiff and are copyrightable subject matter under the laws of the United States.

V.

Between the dates of January 3 and February 6, 1956; June 28 and August 20, 1956; and October 12 and December 7, 1956, Plaintiff complied in all respects with Title 17, U.S.C., No. 13, and all other laws governing Copyright, and secured the exclusive rights and privileges in and to the Copyright of said

maps and received from the Register of Copyrights, Certificates of Registration dated and identified as follows:

February 6, 1956,
Class FF,
Registration No. 20463;

August 20, 1956,
Class FF,
Registration No. 21586;

December 7, 1956,
Class FF,
Registration No. 22265.

VI.

Since the dates of February 6, 1956; August 20, 1956; and December 7, 1956, said maps have been published by Plaintiff, and all copies of it made by Plaintiff and under his authority or license have been printed and published in strict conformity with the provisions of Title 17, U.S.C., No. 13, and all other laws governing Copyright. [114]

VII.

Since the dates of February 6, 1956; August 20, 1956; and December 7, 1956, Plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the Copyrights in said maps.

VIII.

After February 6, 1956; August 20, 1956; and December 7, 1956, Defendants, and each of them,

have infringed said Copyrights by publishing and placing upon the market maps entitled *Hesperia*, which were copied by said defendants, and each of them, largely from Plaintiff's Copyrighted Maps entitled *Hesperia*, without the consent of the Plaintiff.

IX.

Copies of Plaintiff's Copyrighted Maps are hereto attached as Exhibit 1, Exhibit 2 and Exhibit 3, and a copy of Defendants' infringing map is attached hereto as Exhibit 4.

X.

Plaintiff has notified the Defendants, and each of them, that the said Defendants have infringed the Copyright of Plaintiff, and Defendants have continued to infringe the said Copyrights.

Wherefore, Plaintiff demands:

1. That the Defendants, jointly and severally, their agents and servants, be enjoined during the pendency of this action, and permanently, from infringing said Copyrights of Plaintiff in any manner;
2. That the Defendants, jointly and severally, be required to pay to Plaintiff such damages as Plaintiff has sustained in consequence of Defendants' infringement of said Copyrights, and to account for and pay over to Plaintiff all the gains, profits and advantages derived by Defendants from his or their infringement of Plaintiff's Copyrights, or such damages as to the Court will appear proper within the

provisions of the Copyright Statutes, but not less than Two Hundred Fifty Dollars (\$250.00) ;

3. That the Defendants, jointly and severally, be required to deliver up, to be impounded during the pendency of this action, all copies in their [115] possession or under their control, infringing said Copyrights, and to deliver up for destruction all infringing copies, and the plates, molds, and other matter for making said infringing copies ;

4. That the Defendants, jointly and severally, pay to Plaintiff the costs of this action, and reasonable attorney's fees to be allowed to the Plaintiff by the Court.

5. That Plaintiff have such other and further relief as is just.

Respectfully,

C. H. TROWLER,

By /s/ ALAN FRANKLIN,

Attorneys for Plaintiff.

Los Angeles, California, April 11, 1957.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 11, 1957. [116]

[Title of District Court and Cause.]

Civil Action No. 221-57—HW

ANSWER

Comes now the defendants, M. Penn Phillips, and M. Penn Phillips, doing business as M. Penn Phillips Associates, and in answer to the First Amended Complaint of plaintiff on file herein, admit, deny and allege as follows:

I.

In answer to Paragraph III of plaintiff's amended complaint, these answering defendants deny each and every allegation contained therein.

II.

In answer to Paragraph IV, these answering defendants do not have sufficient information and belief to answer the allegations contained therein, and upon such lack of information and belief, denies each and every allegation therein contained, [118] and specifically deny that the material was original with plaintiff or were copyrightable as therein alleged and, in this connection allege that the material was procured by and through the offices of Hesperia Land Development Company, Hesperia Sales Corporation or their agents and servants.

III.

In answer to the allegations contained in Paragraph V, these answering defendants have not suf-

ficient information or belief to answer the allegations contained therein, and upon such lack of information and belief deny each and every allegations contained therein.

IV.

In answer to the allegations in Paragraph VI, these answering defendants have not sufficient information or belief to answer the allegations contained therein, and upon such lack of information and belief deny each and every allegation therein contained.

V.

In answer to Paragraph VII, these answering defendants have not sufficient information or belief to answer the allegations contained therein, and upon such lack of information and belief deny each and every allegation therein contained.

VI.

In answer to Paragraph VIII, these answering defendants deny each and every allegation contained therein; and affirmatively allege that any use of said material as therein contained was used with the consent of the plaintiff herein.

VII.

In answer to Paragraph X of plaintiff's complaint, these answering defendants deny each and every allegation contained therein. [119]

Wherefore, Defendants pray that plaintiff take nothing; that defendants recover their costs incurred

herein and for such other relief that might be just and equitable in the premises.

/s/ HOUSTON A. SNIDOW,
Attorney for Defendants.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed April 26, 1957. [120]

[Title of District Court and Cause.]

Civil Action No. 179-57—HW

DEFENDANTS' ANSWER TO FIRST
AMENDED COMPLAINT

Come Now, the Defendants, Fred W. Austin, William R. Blumfield and Harold W. Siede, Co-Partners, Doing Business as Industrial Lithographers; Fred W. Austin, Doing Business as Industrial Lithographers, and Fred W. Austin, and Answering Plaintiff's First Amended Complaint, Deny, Admit and Allege:

I.

Admit that the Plaintiff purports to bring an action under the provisions of the Copyright Act as alleged in Plaintiff's First Amended Complaint.

II.

Admit that Plaintiff purports to be a resident of the County of Los Angeles, State of California.

III.

Admit that Defendants, Fred W. Austin, William R. Blumfield, and Harold W. Siede are associated together, doing business as Industrial [6] Lithographers, and that said Defendants are doing business in the State of California, and reside within the County of Los Angeles, State of California.

IV.

Defendants are not in possession of sufficient facts and information to enable them to admit the allegations of Plaintiff set forth in Paragraph IV of its First Amended Complaint, and basing their denial on said lack of information and belief, deny both generally and specifically that Plaintiff created and/or authorized original maps with a title "Map of Antelope Valley Portion of Kern County-San Bernardino County." And upon the same grounds; Defendants deny that same contains a large amount of material wholly original with Plaintiff consisting of copyrightable subject matter under the laws of the United States.

V.

Answering Paragraph V of said First Amended Complaint, these Defendants deny that between the dates of October 24, 1955, and February 6, 1956, Plaintiff complied with the Copyright Act and secured exclusive rights and privileges in and to the copyright of said maps.

VI.

Deny both generally and specifically all the allegations of Paragraph VI of Plaintiff's First Amended Complaint.

VII.

Deny both generally and specifically all the allegations of Paragraph VII of Plaintiff's First Amended Complaint.

VIII.

Deny both generally and specifically all the allegations of Paragraph VIII of Plaintiff's First Amended Complaint.

IX.

Deny both generally and specifically all the allegations of Paragraph IX of Plaintiff's First Amended Complaint. [7]

X.

Deny both generally and specifically all the allegations of Paragraph X of Plaintiff's First Amended Complaint.

For a Further Separate and Affirmative Defense, Defendants Allege:

That Plaintiff is in truth and in fact attempting to state a cause of action for damages purporting to arise out of a supposed implied contract between the parties constituting a relationship of employer and employee; that by reason thereof, any relief to plaintiff arising therefrom is not to be obtained under any provision of the Copyright Act, to wit, U.S. Constitution, Art. I, Sec. 8; 17 U.S.C.A. Chapter 1.

Wherefore, Defendants Demand:

1. That Plaintiff take nothing by his said alleged cause of action.
2. That the Plaintiff's cause of action be dismissed.
3. That the Court award to Defendants an Attorneys' fee in a reasonable sum to be fixed by the Court, on account of filing a wholly unjustified complaint in the above-entitled matter.
4. That Defendants be awarded their costs herein laid out and expended.
5. For such other and further relief as may seem proper in the premises.

INDUSTRIAL
LITHOGRAPHERS,
FRED W. AUSTIN,
WILLIAM R. BLUMFIELD and
HAROLD W. SIEDE,

By /s/ FRED W. AUSTIN,
Defendants.

PORTER C. BLACKBURN and
GEORGE R. MAURY,

By /s/ PORTER C. BLACKBURN,
Attorneys for Defendants.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed May 3, 1957. [8]

[Title of District Court and Cause.]

No. 211-57—HW Civil

MINUTES OF THE COURT

Sept. 23, 1957

Present: Hon. Harry C. Westover, District Judge;
Counsel for Plaintiff: Melville B. Nimmer.
Counsel for Defendant: Frank Mankiewicz.

Proceedings: For Pretrial Conference:

Court and counsel make statements. Counsel for plaintiff is ordered to prepare and file affidavit signed by plaintiff re preparation of maps involved in suit, and serve copies on all counsel; and further it is ordered that memo of points and authorities on question of copyright be presented. Counsel for plaintiff have to and including October 21, 1957, in which to present above, and counsel for defendants have ten (10) days thereafter to file any memoranda. It is further ordered that all discovery proceedings are stayed until further notice.

Court orders Cases 179-57-HW; 211-57-HW; 219-57-HW, and 221-57-HW consolidated for trial.

JOHN A. CHILDRESS,
Clerk;

By /s/ MARY O. SMITH,
Deputy Clerk. [72]

[Title of District Court and Cause.]

Civil Action Nos. 22157-HW ; 179-57-HW ;
211-57-HW ; 219-57-HW

AFFIDAVIT OF CHARLES H. TROWLER

Charles H. Trowler, being duly sworn, deposes and says:

1. I am the plaintiff in the above-entitled actions.
2. I am an experienced mapmaker, having been employed in such capacity by the American Automobile Association (the "AAA") for a number of years prior to the establishment of my own business, Standard Maps. In making maps for the "AAA" I followed essentially the same procedure as is outlined below in connection with the preparation of my own maps.
3. During the month of July, 1955, I was informed by an employee of San Bernardino County that no maps existed for the [12] area known as Hesperia. I thereupon decided that a map of Hesperia would be useful and would have commercial value and accordingly went about preparing same in the manner hereinafter indicated.
4. During the month of July, 1955, I purchased the following: a book of Recorded Tract Sheets containing fifty-two sheets in book form covering the Hesperia area; fifty-five sheets entitled "The County Road System, San Bernardino, County, California"; a map of the County of San Bernardino;

approximately twenty maps issued by the United States Department of Interior; several maps issued by the California State Highway Division; and two different railroad maps of the area between Hesperia and Cushenberry, issued by the Atchison Topeka and Santa Fe Railroad, indicating the location of railroad tracks, as well as certain other information. None of these maps contained any copyright notice.

5. I next attached all the tract sheets found in the aforesaid Recorded Tract Sheets into one gigantic map by placing the individual tract sheets in proper relation to each other. In joining the tract sheets together, I had to determine where the boundaries of each individual section occurred so as to determine the proper place for joining the sheets. In assembling the sheets I had to allow for varying scales on the different sheets. The scale used in the aforesaid Sheets varied from one inch to 80 feet to one inch to 1000 feet. The scale of the other maps mentioned above varied from approximately one inch to one mile to one inch to six miles. I then made a free-hand drawing copy of the assembled Tract Sheets to a scale of four inches to one mile. In making the aforesaid reduction I included only the streets as set forth in the tract sheets. I excluded the numbers of the lots, the measurements of the lots, the lot lines, the easements, the pipelines, and the curbs. Where the original tract sheets repeatedly [13] stated the names of the streets, in my map the name of each street is mentioned only once. I then added to my map the following elements which are not found in the tract sheets:

Element

Main Highway—Source: "County Road System" Map.

Bear Valley Road—Source: "County Road System" Map.

Mojave River—Source: "County Road System" Map.

Railroad Tracks—Source: A.T. & S.F. Railroad Map.

Proper Altitudes—Source: A.T. & S.F. Railroad Map.

Certain Roads—Source: A.T. & S.F. Railroad Map.

Certain Roads—Source: Federal Government Road Map.

Section Numbers—Source: I evolved these from the indications of Townships and Ranges on the two San Bernardino County Maps.

Lake—Source: San Bernardino County Map.

Location of Old Historical Hotel—Source: My personal observation.

Golf Course—Source: My personal observation.

Chamber of Commerce Building—Source: My personal observation.

Community Hall—Source: My personal observation.

Fire Station—Source: My personal observation.

Proposed Hotel Site—Source: My personal observation.

6. During the months of October, November, and December, 1955, I drove extensively in the Hesperia

area, observing the elements listed in my map and verifying and counterchecking the accuracy of all such elements. I also clocked the mileage of the roads as set forth in my map in order to verify the accuracy of mileage listings.

7. In the course of my personal verification of the elements set forth in my map, I noted many inconsistencies in the names of streets. For instance, in one place a given street was called a "Road" and at another place it was called an "Avenue" and [14] in another place it was called a "Street." Therefore, at my suggestion, Mr. Penn Phillips adopted a consistent system whereby all north and south roads are designated "Avenues" and all east and west roads are designated "Streets," except that such east and west roads as occur at one mile intervals are designated "Roads." I accordingly also incorporated this suggestion in my map.

8. In preparing my map of Antelope Valley I followed substantially the same procedure as that set forth above with respect to my map of Hesperia.

/s/ CHARLES H. TROWLER.

Subscribed and sworn to before me this 18th day of October, 1957.

[Seal] /s/ RICHARD SINSHEIMER,
Notary Public in and for Said
County and State.

Affidavit of service by mail attached.

[Endorsed]: Filed October 22, 1957. [15]

[Title of District Court and Cause.]

Civil Action Nos. 211-57-HW;
221-57-HW; 219-57-HW

NOTICE OF MOTION TO DISMISS, FOR
JUDGMENT ON THE PLEADINGS AND
FOR SUMMARY JUDGMENT

To Melville B. Nimmer, attorney for plaintiff:

Please take notice that the undersigned defendants will bring the motion to dismiss the actions, for judgment on the pleadings and for summary judgment, because the complaint fails to state a claim against said defendants, filed herein by said defendants on for hearing before the United States District Court for the Southern District of California, Central Division, at Room 231, Post Office and Courthouse Building, Los Angeles, California, on the 18th day of November, 1957, at 11:00 o'clock a.m. of that day or as soon thereafter as counsel can be heard. [73]

Dated: November 4, 1957.

KAPLAN, LIVINGSTON,
GOODWIN & BERKOWITZ,

By /s/ FRANK MANKIEWICZ,
Attorney for Defendant Western Woods of Hesperia.

JACOB W. SILVERMAN,

By /s/ FRANK MANKIEWICZ,

Attorney for Defendants

Harwick, Kagan and Brant.

BISHOP MOORE,

By /s/ FRANK MANKIEWICZ,

Attorney for Defendant

M. Penn Phillips. [74]

[Title of District Court and Cause.]

Civil Action Nos. 211-57-HW;

221-57-HW; 219-57-HW

MOTION TO DISMISS, FOR JUDGMENT ON
THE PLEADINGS AND FOR SUMMARY
JUDGMENT

Defendants Western Woods of Hesperia, William Harwick, John Kagan, Bert B. Brant and M. Penn Phillips move to dismiss the action, for judgment on the pleadings, and for summary judgment because the complaint fails to state a claim against said defendants upon which relief can be granted, as more fully appears from the affidavit of Plaintiff on file herein and the memorandum of Points and Authorities attached hereto.

KAPLAN, LIVINGSTON,

GOODWIN & BERKOWITZ,

By /s/ FRANK MANKIEWICZ,

Attorneys for Defendant Western Woods of Hesperia. [75]

JACOB W. SILVERMAN,

By /s/ FRANK MANKIEWICZ,
Attorney for Defendants
Harwick, Kagan and Brant.

BISHOP MOORE,

By /s/ FRANK MANKIEWICZ,
Attorney for Defendant
M. Penn Phillips.

Affidavit of service by mail attached.

[Endorsed]: Filed November 5, 1957. [76]

[Title of District Court and Cause.]

Nos. 211-57-HW ; 221-57-HW ; 219-57-HW

Present: Hon. Harry C. Westover, District Judge;

Nov. 18, 1957.

At: Los Angeles, Calif.

MINUTES OF THE COURT

Counsel for Plaintiff: Melville B. Nimmer;
Counsel for Defendants in Cases No. 211-
57-HW and 221-57-HW: Frank Man-
kiewicz;

Counsel for Defendants in Case No. 219-57-
HW: no appearance. (Jacob W. Silver-
man.)

Proceedings: For hearing motion of defendants filed 11/5/57), to dismiss; for judgment on the pleadings and for summary judgment.

Court grants motion to dismiss. Counsel for defendant to prepare order.

Attorney Nimmer makes a statement.

JOHN A. CHILDRESS,
Clerk;

By /s/ MARY O. SMITH,
Deputy Clerk. [92]

[Title of District Court and Cause.]

No. 211-57-HW

STIPULATION FOR DISMISSAL
OF COUNTERCLAIMS

It is hereby stipulated by the parties, through their respective counsel, that the first and second counterclaims of defendant in the above-entitled action be dismissed without prejudice and without cost to either party.

Dated November 22, 1957.

KAPLAN, LIVINGSTON,
GOODWIN & BERKOWITZ,
Attorneys for Defendant;

By /s/ FRANK MANKIEWICZ,
MELVILLE B. NIMMER,
Attorney for Defendant;
By /s/ RICHARD SINSHEIMER.

It Is So Ordered

/s/ H. C. WESTOVER,
U. S. District Judge.

[Endorsed]: Filed and entered November 25, [93]
1957.

In the United States District Court for the South-
ern District of California, Central Division

Civil Action No. 211-57—HW

C. H. TROWLER, d/b/a STANDARD MAPS,
Plaintiff,

vs.

WESTERN WOODS OF HESPERIA,
Defendant.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND JUDGMENT

The motion of the defendant for Summary Judgment, pursuant to Rule 12 (b) and Rule 56 (c) of the Rules of Civil Procedure, having been presented, and the Court being fully advised in the premises, now finds the following:

Findings of Fact

I.

In preparing the map of Hesperia, California, of whose infringement the plaintiff complains, plain-

tiff purchased a book of recorded tract sheets covering the Hesperian area, fifty-five sheets entitled "The County Road System, San Bernardino County, California," a map of the County of San Bernardino, approximately twenty maps issued by the Department of the Interior of the United States Government, several maps issued by the Highway Division of the State of California and two maps issued by the Atchison, Topeka and Santa Fe Railroad. [95]

II.

Plaintiff then combined the tract sheets into one large map, excluded certain information contained thereon and added certain elements from the other maps he had purchased.

III.

From his personal observation plaintiff then added only the following: A lake, "the Old Historical Hotel," the golf course, the Chamber of Commerce Building, the County Hall, the fire station and the proposed hotel site.

IV.

Plaintiff added nothing to the map of whose infringement he complains, that was original or novel.

Conclusions of Law

I.

The map of whose infringement plaintiff complains is not entitled to copyright under the Copy-

right Laws of the United States, Title 17, U.S.C. 1, et seq., for want of original work. *Amsterdam v. Triangle Publications, Inc.*, 189 F. 2d. 104 (3rd Cir. 1951), *Christianson v. West Publishing Co.* 149 F. 2d. 202 (9th Cir. 1945).

II.

Defendant is entitled to summary judgment as a matter of law.

Judgment

In accordance with the foregoing Findings of Fact, and Conclusions of Law, it is hereby ordered, adjudged and decreed that the defendant's motion for summary judgment be and the same is hereby granted, that the plaintiff have and recover nothing by his suit, that the defendant go hence without day, and that defendant recover its costs and charges in this behalf extended and have execution therefor.

Dated: Dec. 2, 1957.

/s/ HARRY C. WESTOVER,
United States District Judge.

Affidavit of service by mail attached.

Lodged November 25, 1957.

[Endorsed]: Filed December 2, 1957.

Entered December 3, 1957. [96]

In the United States District Court for the Southern
District of California, Central Division

Civil Action No. 219-57—HW

C. H. TROWLER, d/b/a STANDARD MAPS,
Plaintiff,

vs.

WILLIAM HARWICK, JOHN KAGAN and
BERT BRANT, d/b/a HARWICK, KAGAN
& BRANT,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The motion of the defendants for Summary Judgment, pursuant to Rule 12 (b) and Rule 56 (c) of the Rules of Civil Procedure, having been presented, and the Court being fully advised in the premises, now finds the following:

Findings of Fact

I.

In preparing the map of Hesperia, California, of whose infringement the plaintiff complains, plaintiff purchased a book of recorded tract sheets covering the Hesperia area, fifty-five sheets entitled "The County Road System, San Bernardino County, California," a map of the County of San Bernardino, approximately twenty maps issued by the Department of the Interior of the United States Gov-

ernment, several maps issued by the Highway Division of the State of California and two maps issued by the Atchison, Topeka and Santa Fe [110] Railroad.

II.

Plaintiff then combined the tract sheets into one large map, excluded certain information contained thereon and added certain elements from the other maps he had purchased.

III.

From his personal observation plaintiff then added only the following: A lake, "the Old Historical Hotel," the golf course, the Chamber of Commerce Building, the County Hall, the fire station and the proposed hotel site.

IV.

Plaintiff added nothing to the map of whose infringement he complains, that was original or novel.

Conclusions of Law

I.

The map of whose infringement plaintiff complains is not entitled to copyright under the Copyright Laws of the United States, Title 17, U.S.C. 1, et seq., for want of original work. *Amsterdam v. Triangle Publications, Inc.*, 189 F. 2d 104 (3rd Cir. 1951), *Christianson v. West Publishing Co.* 149 F. 2d 202 (9th Cir. 1945).

II.

Defendants are entitled to summary judgment as a matter of law.

Judgment

In accordance with the foregoing Findings of Fact, and Conclusions of Law, it is hereby ordered, adjudged and decreed that the defendants' motion for summary judgment be and the same is hereby granted, that the plaintiff have and recover nothing by his suit, that the defendants go hence without day, and that defendants recover their costs and charges in this behalf extended and have execution therefore.

Dated: Dec. 2, 1957.

/s/ HARRY C. WESTOVER,
United States District Judge.

Affidavit of service by mail attached.

Lodged November 25, 1957.

[Endorsed]: Filed December 2, 1957.

Entered December 3, 1957. [111]

In the United States District Court for the Southern
District of California, Central Division

Civil Action No. 221-57—HW

C. H. TROWLER, d/b/a STANDARD MAPS,
Plaintiff,

vs.

M. PENN PHILLIPS, and M. PENN PHILLIPS
d/b/a PENN PHILLIPS ASSOCIATES,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

The motion of the defendant for Summary Judgment, pursuant to Rule 12 (b) and Rule 56 (c) of the Rules of Civil Procedure, having been presented, and the Court being fully advised in the premises, now finds the following:

Findings of Fact

I.

In preparing the map of Hesperia, California, of whose infringement the plaintiff complains, plaintiff purchased a book of recorded tract sheets covering the Hesperia area, fifty-five sheets entitled "The County Road System, San Bernardino County, California," a map of the County of San Bernardino, approximately twenty maps issued by the Department of the Interior of the United States Government, several maps issued by the Highway Di-

vision of the State of California and two maps issued by the Atchison, Topeka and Santa Fe Railroad. [125]

II.

Plaintiff then combined the tract sheets into one large map, excluded certain information contained thereon and added certain elements from the other maps he had purchased.

III.

From his personal observation plaintiff then added only the following: A lake, "the Old Historical Hotel," the golf course, the Chamber of Commerce Building, the County Hall, the fire station and the proposed hotel site.

IV.

Plaintiff added nothing to the map of whose infringement he complains, that was original or novel.

Conclusions of Law

I.

The map of whose infringement plaintiff complains is not entitled to copyright under the Copyright Laws of the United States, Title 17, U.S.C. 1, et seq., for want of original work. *Amsterdam v. Triangle Publications, Inc.*, 189 F. 2d 104 (3rd Cir. 1951), *Christianson v. West Publishing Co.* 149 F. 2d 202 (9th Cir. 1945).

II.

Defendant is entitled to summary judgment as a matter of law.

Judgment

In accordance with the foregoing Findings of Fact, and Conclusions of Law, it is hereby ordered, adjudged and decreed that the defendant's motion for summary judgment be and the same is hereby granted, that the plaintiff have and recover nothing by his suit, that the defendant go hence without day, and that defendant recover his costs and charges in this behalf extended and have execution therefor.

Dated: Dec. 2, 1957.

/s/ HARRY C. WESTOVER,
United States District Judge.

Affidavit of service by mail attached.

Lodged November 25, 1957.

[Endorsed]: Filed December 2, 1957.

Entered December 3, 1957. [126]

[Title of District Court and Cause.]

Civil Action Nos. 221-57—HW, 211-57—HW,
219-57—HW

NOTICE OF APPEAL

Notice is hereby given that C. H. Trowler, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgments entered in each of the above-entitled actions on December 3, 1957.

Dated: December 27, 1957.

/s/ MELVILLE B. NIMMER,
Attorney for Plaintiff.

Affidavit of service by mail attached

[Endorsed]: Filed December 31, 1957. [128]

[Title of District Court and Cause.]

Civil Action No. 179-57—HW

NOTICE OF MOTION AND SUPPORTING
PAPERS

To the Plaintiff Above Named and to Melville B.
Nimmer, His Attorney:

You, and Each of You Are Hereby Notified that on the 20th day of January, 1958, at the opening of court, or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Harry Westover, in the Federal Building, 312 North Spring Street, Los Angeles, California, the defendants will call up for hearing on the calendar the attached Motion.

Dated: January 9, 1958.

PORTER C. BLACKBURN,
MAURY, LARSEN & HUNT,

By /s/ GEORGE R. MAURY. [26]

[Title of District Court and Cause.]

Civil Action No. 179-57—HW

MOTION FOR SUMMARY JUDGMENT

Come now the defendants Fred W. Austin, William R. Blumfield and Harold W. Siede, co-partners doing business as Industrial Lithographers, and Fred W. Austin, and respectfully move the Court for Summary Judgment in favor of the defendants and against the plaintiff, and for the award therein of attorneys' fees under the copyright laws of the United States, for the defendants' legal expense.

Said motion is based upon all of the pleadings and files in the above-entitled matter, and upon the affidavit of Charles H. Trowler, and upon the deposition of Charles H. Trowler heretofore taken in this action, and upon the duly authenticated copies of the complaint, answer and judgment after trial by the Court in that certain action heretofore pending in the Municipal Court, Glendale Judicial District, County of Los Angeles, entitled: "Fred W. Austin, William R. Blumfield and Harold W. [27] Siede, Co-partners doing business as Industrial Lithographers, Plaintiff, vs. Charles H. Trowler and Charles H. Trowler doing business as Standard Maps, Defendants," and numbered 5636, of the actions on file in the office of the Clerk of said Municipal Court, which are hereto attached as required by Section 1738, Title 28, of the United States Code, said copies being marked, respectively,

Exhibits "A," "B" and "C," and made parts hereof by reference as though set forth in full.

Said motion made upon the grounds that the map pleaded by the plaintiff and which is alleged to have been infringed by these defendants, is lacking in the amount of originality required of a map to be the proper subject of a copyright and that no reasonably substantial portion thereof has resulted from the independent effort of the maker in acquiring a reasonably substantial portion of the information included in and set forth upon said map, and upon the further and separate ground that the defendants herein printed said maps under purchase orders from the plaintiff and as a matter of contract whereby the plaintiff herein employed the defendants to make or to print the maps involved, which maps when so printed were delivered by these defendants to the plaintiff and that such actions of these defendants did not constitute impingement. Photostatic copies of the purchase orders given by plaintiff to these defendants, being Purchase Orders Numbers 6199 and 6200, are hereto attached, marked Exhibit "D" and by reference hereto made a part hereof as though set forth in full, and upon the further and separate ground that the issues contained in the complaint of the plaintiff herein should have been proposed in defense of the said action in the Municipal Court of the Glendale District, and said action should thereafter have been removed to this Court, and the issues sought to be raised by the plaintiff in his

complaint herein are now res adjudicata by virtue of the judgment of the said Municipal Court awarding these [28] defendants a judgment for the purchase price of said maps so printed by these defendants on order of the plaintiff against the plaintiff.

Dated: Jan. 8, 1958.

PORTER C. BLACKBURN
GEORGE R. MAURY,

By /s/ GEORGE R. MAURY,

Attorneys for Defendants.

EXHIBIT A

State of California,
County of Los Angeles—ss.

I, Gertrude C. Beckett, Clerk of the Municipal Court of the City of Glendale, County of Los Angeles, State of California, do hereby certify and attest the foregoing to be a full, true and correct copy of the original Complaint for Goods, Wares and Merchandise and Services Rendered. Account Stated and Open Book Account in Civil Case No. 5636—Austin vs. Trowler, on file in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and annexed the Seal of the Municipal Court

of the City of Glendale, County of Los Angeles, State of California, this 8th day of October, 1957.

[Seal] /s/ GERTRUDE C. BECKETT,
Clerk of the Municipal Court of the City of Glendale, County of Los Angeles, State of California.

State of California,
County of Los Angeles—ss.

I, Kenneth A. White, Judge of the Municipal Court of the City of Glendale, County of Los Angeles, State of California, do hereby certify that Gertrude C. Beckett is Clerk of the Municipal Court of the City of Glendale, County of Los Angeles, State of California (which Court is a Court of Record, having a seal); that the signature to the foregoing certificate and attestation is the genuine signature of the said Gertrude C. Beckett as such officer; that the seal annexed thereto is the seal of said Municipal Court; that said Gertrude C. Beckett as such Clerk is the proper officer to execute the said certificate and attestation, and that such attestation is in due form according to the laws of the State of California.

In Witness Whereof, I have hereunto set my hand in my official character as such Judge, at the City of Glendale, County of Los Angeles, State aforesaid, this 8th day of October, 1957.

/s/ KENNETH A. WHITE,
Judge of the Municipal Court of the City of Glendale, County of Los Angeles, State of California.

State of California,
County of Los Angeles—ss.

I, Gertrude C. Beckett, Clerk of the Municipal Court of the City of Glendale, County of Los Angeles, State of California (which Court is a Court of Record, having a seal, which is annexed hereto), do hereby certify that Kenneth A. White whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing the same, Judge of the Municipal Court aforesaid, and was duly commissioned, qualified and authorized by law to execute said certificate. And I do further certify that the signature of the Judge above named to the said certificate of due attestation is genuine.

In Witness Whereof, I have hereunto set my hand and annexed the Seal of the Municipal Court, at my office in said City, this 8th day of October, 1957.

[Seal] /s/ GERTRUDE C. BECKETT,
Clerk of the Municipal Court of the City of Glendale, County of Los Angeles, State of California. [41]

In the Municipal Court, Glendale Judicial District,
County of Los Angeles, State of California

No. 5636

FRED W. AUSTIN, WILLIAM R. BLUMFIELD
and HAROLD W. SIEDE, Co-Partners Doing
Business as INDUSTRIAL LITHOGRA-
PHERS,

Plaintiffs,

vs.

CHARLES H. TROWLER, and CHARLES H.
TROWLER Doing Business as STANDARD
MAPS,

Defendants.

COMPLAINT FOR GOODS, WARES AND
MERCHANDISE AND SERVICES REN-
DERED, ACCOUNT STATED AND OPEN
BOOK ACCOUNT

Comes now the plaintiffs above named and com-
plaining of the defendants, and each of them, for
cause of action allege:

I.

That plaintiffs are co-partners doing business
under the fictitious firm name of Industrial Lithog-
raphers and have filed all affidavits concerning this
fictitious firm name required by the laws of the
State of California and have made all publications
concerning the fictitious firm name required by the
laws of the State of California.

II.

That defendants, and each of them, are residents of the City of Glendale, County of Los Angeles, State of California.

III.

That within two years last past within the City of Glendale, County of Los Angeles, State of California, plaintiff rendered services to the defendants, and each of them, and plaintiffs sold and delivered goods to the defendants, and each of them, all at the defendants' special instance and request; and that the defendants, and each of them, promised and agreed to pay to plaintiffs herein the reasonable value of said goods sold and services rendered by the plaintiffs to defendants, and each of them; that the reasonable value of said goods and services delivered and rendered to the defendants, and each of them, by the plaintiffs was and is the sum of \$2,974.82.

IV.

That demand has been made upon defendants, and each of them, by the plaintiffs herein for said sum of \$2,974.82, but that defendants, and each of them, have paid no part of said sum of \$2,974.82, and the sum of \$2,974.82 is now due, owing and unpaid by the defendants, and each of them, to plaintiff herein.

For a Second, Separate and Distinct Cause of Action Against Defendants, and Each of Them, Plaintiffs Allege:

I.

Plaintiff incorporates herein by reference thereto Paragraphs I and II of the first cause of action with the same force and effect as though the same were set forth herein in full.

II.

That on or about the first day of September, 1956, in said City of Glendale, County of Los Angeles, State of California, there was an account stated between plaintiffs and defendants herein, and each of them, upon which said account the said sum of \$2,974.82 was found to be due from the defendants, and each of them, to plaintiffs for services rendered and goods sold by plaintiffs to defendants, and each of them, which sum of \$2,974.82 was agreed upon as the balance due plaintiffs and which sum defendants, and each of them, promised and agreed to pay.

III.

That plaintiffs have demanded of defendants, and each of them, payment of said sum of \$2,974.82 but that defendants, and each of them, have failed and refused and still fail and refuse to pay the sum of \$2,974.82 and that said sum is now due, owing and unpaid from the defendants, and each of them, to plaintiffs herein.

For a Third, Separate and Distinct Cause of Action
Against Defendants, and Each of Them, Plaintiffs Allege:

I.

Plaintiffs incorporate herein by reference thereto Paragraphs I and II of the first cause of action with the same force and effect as though the same were set forth herein in full.

II.

That within two years last past and prior to the commencement of this action, defendants herein, and each of them, became indebted to plaintiffs on an open book account for a balance due in the sum of \$2,974.82 for and on account of services rendered and goods sold and delivered by plaintiffs to defendants, and each of them, at their special instance and request; that although due demand has been made upon defendants, and each of them, for the payment of said sum of \$2,974.82, no part thereof has been paid and the whole thereof is now due, owing and unpaid by said defendants, and each of them.

Wherefore, plaintiffs pray judgment against defendants, and each of them, in the sum of \$2,974.82, with interest thereon at the rate of 7% per annum from September 1, 1956, until paid, for its costs of suit herein incurred and for such other and further relief as to the Court may seem just and equitable in the premises.

HOWARD J. THELIN,

Attorney for Plaintiff.

[Endorsed]: Filed (Municipal Court) Sept. 18, 1956.

EXHIBIT B

State of California,
County of Los Angeles—ss.

I, Gertrude C. Beckett, Clerk of the Municipal Court of the City of Glendale, County of Los Angeles, State of California, do hereby certify and attest the foregoing to be a full, true and correct copy of the original Answer in Civil Case No. 5636—Austin vs. Trowler, on file in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and annexed the Seal of the Municipal Court of the City of Glendale, County of Los Angeles, State of California, this 8th day of October, 1957.

[Seal] /s/ GERTRUDE C. BECKETT,
Clerk of the Municipal Court of the City of Glendale, County of Los Angeles, State of California.

State of California,
County of Los Angeles—ss.

I, Kenneth A. White, Judge of the Municipal Court of the City of Glendale, County of Los Angeles, State of California, do hereby certify that Gertrude C. Beckett is Clerk of the Municipal Court of the City of Glendale, County of Los Angeles, State of California, (which Court is a Court of Record, having a seal); that the signature to the

foregoing certificate and attestation is the genuine signature of the said Gertrude C. Beckett as such officer; that the seal annexed thereto is the seal of said Municipal Court; that said Gertrude C. Beckett as such Clerk is the proper officer to execute the said certificate and attestation and that such attestation is in due form according to the laws of the State of California.

In Witness Whereof, I have hereunto set my hand in my official character as such Judge, at the City of Glendale, County of Los Angeles, State aforesaid, this 8th day of October, 1957.

/s/ KENNETH A. WHITE,

Judge of the Municipal Court of the City of Glendale, County of Los Angeles, State of California.

State of California,
County of Los Angeles—ss.

I, Gertrude C. Beckett, Clerk of the Municipal Court of the City of Glendale, County of Los Angeles, State of California, (which Court is a Court of Record, having a seal, which is annexed hereto), do hereby certify that Kenneth A. White whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing the same, Judge of the Municipal Court aforesaid, and was duly commissioned, qualified and authorized by law to execute said certificate. And I do further

certify that the signature of the Judge above named to the said certificate of due attestation is genuine.

In Witness Whereof, I have hereunto set my hand and annexed the Seal of the Municipal Court, at my office in said City, this 8th day of October, 1957.

[Seal] /s/ GERTRUDE C. BECKETT,
Clerk of the Municipal Court of the City of Glendale, County of Los Angeles, State of California. [42]

In the Municipal Court, Glendale Judicial District,
County of Los Angeles, State of California

No. 5636

FRED W. AUSTIN, et al.,

Plaintiffs,

vs. ,

CHARLES H. TROWLER, et al.,

Defendants.

ANSWER

Comes now the defendant Charles H. Trowler and answering plaintiffs' complaint on file herein admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraphs I and II of plaintiffs' alleged first cause of action.

II.

Answering paragraph III of plaintiffs' complaint defendant admits that within two years, last past, plaintiffs rendered services and sold and delivered goods to this defendant at his special instance and request; denies that the reasonable value of said service and goods rendered and delivered to defendant by plaintiff was and is the sum of \$2,974.82; alleges that the reasonable value of said goods and services delivered and rendered to defendant by plaintiffs was and is of a value of not in excess of the sum of \$1,000.00.

III.

Denies that the sum of \$2,974.82 is now due, owing and unpaid by defendant to plaintiff; alleges that the sum due and owing from this defendant to plaintiff is not in excess of the sum of \$1,000.00.

Answering Plaintiffs' Second Cause of Action, Defendant Admits, Denies and Alleges as Follows:

I.

Denies generally and specifically each and every allegation contained in paragraph II of plaintiffs' second cause of action; denies that the sum of \$2,974.82, or any other sum of money whatsoever was agreed upon as the balance due plaintiffs from this defendant; denies that defendant promised and agreed to pay said sum, or any other sum of money whatsoever.

II.

Answering paragraph III of plaintiffs' second cause of action, defendant denies that the sum of \$2,974.82, or any other sum of money whatsoever is due, owing and unpaid from defendant to plaintiff.

Answering Plaintiffs' Third Cause of Action, Defendant Admits, Denies and Alleges as Follows:

I.

Denies generally and specifically each and every allegation contained in paragraph II of plaintiffs' third cause of action; denies that the sum of \$2,974.82, or any other sum of money whatsoever is due, owing and unpaid from this defendant to plaintiffs.

Wherefore, defendant prays that on plaintiffs' first cause of action plaintiff recover a sum not in excess of \$1,000.00.

2. That plaintiffs take nothing by their said second cause of action.

3. That plaintiffs take nothing by their said third cause of action.

WARD SULLIVAN,
Attorney for Defendant.

[Endorsed]: Filed (Municipal Court) Nov. 13, 1956.

EXHIBIT C

State of California,
County of Los Angeles—ss.

I, Gertrude C. Beckett, Clerk of the Municipal Court of the City of Glendale, County of Los Angeles, State of California, do hereby certify and attest the foregoing to be a full, true and correct copy of the original Judgment After Trial by Court in Civil Case No. 5636—Austin vs. Trowler, on file in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and annexed the Seal of the Municipal Court of the City of Glendale, County of Los Angeles, State of California, this 8th day of October, 1957.

[Seal] /s/ GERTRUDE C. BECKETT,

Clerk of the Municipal Court of the City of Glendale, County of Los Angeles, State of California.

State of California,
County of Los Angeles—ss.

I, Kenneth A. White, Judge of the Municipal Court of the City of Glendale, County of Los Angeles, State of California, do hereby certify that Gertrude C. Beckett is Clerk of the Municipal Court of the City of Glendale, County of Los Angeles, State of California, (which Court is a Court of Record, having a seal); that the signature to the

foregoing certificate and attestation is the genuine signature of the said Gertrude C. Beckett as such officer; that the seal annexed thereto is the seal of said Municipal Court; that said Gertrude C. Beckett as such Clerk is the proper officer to execute the said certificate and attestation, and that such attestation is in due form according to the laws of the State of California.

In Witness Whereof, I have hereunto set my hand in my official character as such Judge, at the City of Glendale, County of Los Angeles, State aforesaid, this 8th day of October, 1957.

/s/ KENNETH A. WHITE,
Judge of the Municipal Court of the City of Glendale, County of Los Angeles, State of California.

State of California,
County of Los Angeles—ss.

I, Gertrude C. Beckett, Clerk of the Municipal Court of the City of Glendale, County of Los Angeles, State of California, (which Court is a Court of Record, having a seal, which is annexed hereto), do hereby certify that Kenneth A. White whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing the same, Judge of the Municipal Court aforesaid, and was duly commissioned, qualified and authorized by law to execute said certificate. And I do further

certify that the signature of the Judge above named to the said certificate of due attestation is genuine.

In Witness Whereof, I have hereunto set my hand and annexed the Seal of the Municipal Court, at my office in said City, this 8th day of October, 1957.

[Seal] /s/ GERTRUDE C. BECKETT,
Clerk of the Municipal Court of the City of Glendale, County of Los Angeles, State of California. [43]

In the Municipal Court of Glendale Judicial District, County of Los Angeles, State of California

FRED W. AUSTIN, et al.,

Plaintiff,

vs.

CHARLES H. TROWLER, et al.,

Defendant.

JUDGMENT AFTER TRIAL BY COURT

This cause came on regularly for trial on April 4, 1957, at 10 a.m., before Kenneth A. White, Judge, plaintiff appearing by attorney Robert Ingram of Counsel; Howard J. Thelin and defendant Charles H. Trowler appearing by attorney Alan Franklin and a jury trial having been duly waived, the Court having heard the testimony and considered the evi-

dence, and findings not having been requested and cause having been ordered to stand submitted for decision, the Court ordered the following Judgment:

It is adjudged that plaintiff Fred W. Austin, William R. Blumfield and Harold W. Siede, Copartners doing business as Industrial Lithographers, have and recover from Defendant Charles H. Trowler the sum of \$2,503.00 damages and \$81.00 interest, together with costs in the sum of \$67.55.

I hereby certify this to be a true copy of the Judgment in the above case rendered on April 4, 1957, and entered in Minute Book No. 2, Page 218, on April 9, 1957.

GERTRUDE C. BECKETT,
Clerk of Said Court,

By ARLIE F. OLSON,
Deputy.

Compared and corrected: Minute Book Arlie F. Olson, Register AFO.

[Endorsed]: Filed (Municipal Court) April 9, 1957.



[Title of District Court and Cause.]

MINUTES OF THE COURT

Feb. 3, 1958

At: Los Angeles, Calif.

Present: Hon. Harry C. Westover, District Judge.

Counsel for Plaintiff: Melville B. Nimmer.

Counsel for Defendants: Porter C. Blackburn and George R. Maury.

Proceedings: For hearing motion of defendants
(filed 1/10/58) for summary judgment.

Attorney Nimmer argues in opposition to said motion.

Court grants motion on the theory that the Court has no jurisdiction.

Counsel for defendants to prepare formal findings, etc.

JOHN A. CHILDRESS,
Clerk.

By /s/ MARY O. SMITH,
Deputy Clerk [50]

[Title of District Court and Cause.]

Civil Action Nos. 221-57—HW, 211-57—HW,
219-57—HW

ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET APPEAL

It is by the Court this 7th day of February, 1958,
Ordered:

That the time for filing the record on appeal and docketing the appeal in the United States Court of Appeals for the 9th Circuit in connection with the above-entitled actions be, and it hereby is, extended to and including February 20, 1958.

/s/ HARRY C. WESTOVER,
United States District Judge,

[Endorsed]: Filed February 7, 1958. [130]

[Title of District Court and Cause.]

No. Civil Action 179-57-HW

AFFIDAVIT RE ATTORNEY'S FEES

State of California,
County of Los Angeles—ss.

George R. Maury, being duly sworn, deposes and says:

That he is one of the attorneys for the defendants in the above-entitled action; that he makes this affidavit with respect to services rendered herein for and on behalf of the defendants and on behalf of his associate, Porter C. Blackburn, Esq., who is at present in a hospital convalescing from surgery.

Attorneys' services which have been rendered in the above-entitled action on behalf of defendants are as follows:

Taking the deposition of plaintiff in the above-entitled action, analysis of the issues, conferences with the clients, drafting the necessary answer, corresponding with opposing [51] counsel, briefing of the issues involved, the drafting and presentation of a Motion to Dismiss, the drafting of an Order Dismissing Complaint with Leave to Amend, preparation for pretrial hearing; drafting Answers to Interrogatories presented by the plaintiff, drafting Answer to First Amended Complaint, drafting Affidavits, interviewing witnesses, drafting Affidavits of defendants' Motion for Summary Judgment, drafting Memorandum of Points and Authorities, and supporting documents containing and presenting authenticated copies of the records of the Municipal Court, Glendale, California, scrutiny and study of Affidavit of Charles H. Trowler, presentation of Motion for Summary Judgment, drafting Findings of Fact and Conclusions of Law and Judgment.

Affiant respectfully shows the Court that the foregoing labor has utilized approximately sixty (60) hours of attorneys' time, and that the reasonable value of the time for attorneys' services in and about the area of Los Angeles in copyright cases is approximately \$35.00 per hour. That the reasonable value in this case therefor is the sum of \$2,100.00 for defense of this case.

Dated: February 10, 1958.

/s/ GEORGE R. MAURY.

Subscribed and sworn to before me this 10th day of February, 1958.

[Seal] /s/ STEINER A. LARSEN,
Notary Public in and for Said
County and State.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 11, 1958. [52]

[Title of District Court and Cause.]

Civil Action Nos. 221-57-HW,
211-57-HW, 219-57-HW

ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET APPEAL

It is by the Court this 17th day of February, 1958, Ordered:

That the time for filing the record on appeal and docketing the appeal in the United States Court of Appeals for the 9th Circuit in connection with the above-entitled actions be, and it hereby is, extended to and including March 16th, 1958.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed February 17, 1958. [132]

In the United States District Court, Southern
District of California, Central Division

No. 179-57-HW Civil Action

C. H. TROWLER, d/b/a STANDARD MAPS,

Plaintiff,

vs.

FRED W. AUSTIN, WILLIAM R. BLUMFIELD
AND HAROLD W. SIEDE, Copartners d/b/a
INDUSTRIAL LITHOGRAPHERS,

Defendants.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT

The above-entitled cause came on regularly to be heard on the 3rd day of February, 1958, before Hon. Harry C. Westover, Judge, on the Motion of Defendant for a Summary Judgment, Melville B. Nimmer, Esq., attorney for plaintiff, and Porter C. Blackburn, Esq., and George R. Maury, Esq., appearing as attorneys for defendant, and the cause having been submitted on the defendants' motion, the affidavit of the plaintiff herein, and affidavits filed for and against said Motion and on the Deposition taken of the plaintiff and on the Interrogatories and Answers thereto and on all the documents on file herein, and the Court having ordered said Motion granted, the Court makes herein its Findings of Fact and Conclusions of Law, as follows:

I.

That plaintiff is a map maker and owns a map entitled: "Map of Antelope Valley Portion of Kern County-San Bernardino County," but that said map lacks sufficient originality resulting from the independent effort of the plaintiff to entitle it to be copyrighted.

Conclusions of Law

From the foregoing Findings of Fact, the Court makes its Conclusions of Law, as follows:

I.

That the plaintiff has no valid copyright upon the map entitled: "Map of Antelope Valley Portion of Kern County-San Bernardino County."

II.

That since the plaintiff has no valid copyright, this Court is without jurisdiction as to any and all other phases of this action, save and except to award defendant's attorneys fees and costs.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law, It Is Ordered, Adjudged and Decreed that plaintiff take nothing by his complaint, and defendants do have and recover judgment against plaintiff for their costs herein expended, which are hereby taxed in the sum of \$., and no attorneys' fees be awarded to said defendants.

Dated: February 27th, 1958.

/s/ HARRY C. WESTOVER,
Judge of the United States
District Court.

Lodged February 24, 1958.

[Endorsed]: Filed and entered February 27,
1958.

[Title of District Court and Cause.]

Civil Action No. 179-57-HW

NOTICE OF APPEAL

Notice is hereby given that C. H. Trowler, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled action on February 27, 1958.

Dated: March 3, 1958.

/s/ MELVILLE B. NIMMER,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 4, 1958. [133]

[Title of District Court and Cause.]

Civil Action Nos. 221-57-HW, 211-57-HW,
219-57-HW, 179-57-HW

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The Court erred in granting defendants' Motion for Summary Judgment in each of the above-entitled actions.

2. The Court erred in concluding, as a matter of law, that the maps which plaintiff complains were infringed in each of the above-entitled actions are not entitled to copyright under [140] the Copyright Laws of the United States for want of original work.

3. The Court erred in finding that the facts set forth in plaintiff's Affidavit dated October 18, 1957, did not constitute original work, which would entitle plaintiff to copyright.

/s/ MELVILLE B. NIMMER,
Attorney for Plaintiff.

[Endorsed]: Filed March 4, 1958. [141]

[Title of District Court and Cause.]

Nos. 179-57-HW, 211-57-HW,
219-57-HW, 221-57-HW

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cases:

A. The foregoing pages numbered 1 to 141, inclusive, containing the original:

(1) Case No. 179-57-HW—Trowler v. Austin, et al.

First Amended Complaint.

Defendant's Answer to First Amended Complaint.

Substitution of Attorneys.

Affidavit of Charles H. Trowler.

Notice of Motion and Motion for Summary Judgment and supporting papers.

Minute Order of 2/3/58.

Affidavit re Attorneys' Fees.

(Certified copy) Findings of Fact, Conclusions of Law and Judgment.

Notice of Appeal.

Stipulation as to Record on Appeal and Designation of Contents of Record on Appeal.

Counter Designation of Appellees.

Statement of Points.

(2) Case No. 211-57-HW—Trowler v. Western Woods Assoc.

Complaint.

Answer and Counterclaim.

Substitution of Attorneys.

Minute Order of 9/23/57.

Notice of Motion to Dismiss, for Judgment on the Pleadings and for Summary Judgment.

Minute Order of 11/18/57.

Stipulation to Dismiss of Counterclaims.

Notice of Findings of Fact, Conclusions of Law and Judgment.

Findings of Fact, Conclusions of Law and Judgment.

Notice of Appeal.

Order Extending Time to file Record and Docket Appeal, filed 2/7/58.

Order Extending Time to file Record and Docket Appeal, filed 2-17-58.

Stipulation as to Record on Appeal and Designation of Contents of Record on Appeal.

Statement of Points.

(3) Case No. 219-57-HW—Trowler v. Harwick, et al.

Complaint.

Answer of Defendants.

Substitution of Attorneys.

Notice of Motion to Dismiss, for Judgment on the Pleadings and for Summary Judgment.

Minute Order of 11/18/57.

Notice of Findings of Fact, Conclusions of Law and Judgment.

Findings of Fact, Conclusions of Law and Judgment.

Notice of Appeal.

Order Extending Time to file Record and Docket Appeal, filed 2/7/58.

Order Extending Time to file Record and Docket Appeal, filed 2-17-58.

Stipulation as to Record on Appeal and Designation of Contents of Record on Appeal.

Statement of Points.

(4) Case No. 221-57-HW—Trowler v. Phillips, et al.

First Amended Complaint.

Answer of Defendants.

Substitution of Attorneys.

Notice of Motion to Dismiss, for Judgment on the Pleadings and for Summary Judgment.

Minute Order of 11/18/57.

Notice of Findings of Fact, Conclusions of Law and Judgment.

Findings of Fact, Conclusions of Law and Judgment.

Notice of Appeal.

Order Extending Time to file Record and Docket Appeal, filed 2/7/58.

Order Extending Time to file Record and Docket Appeal, filed 2/17/58.

Stipulation as to Record on Appeal and Designation of Contents of Record on Appeal.

Statement of Points.

I further certify that my fee for preparing the foregoing record, amounting to \$2.00, has been paid by appellant.

Dated: March 7, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15923. United States Court of Appeals for the Ninth Circuit. C. H. Trowler, Doing Business as Standard Maps, Appellant, vs. M. Penn Phillips and M. Penn Phillips, Doing Business as M. Penn Phillips, Associates; Western Woods Associates, William Harwick, John Kagan and Bert B. Brant, Doing Business as Harwick, Kagan & Brant; Fred W. Austin, William R. Blumfield and Harold W. Siede, Copartners, Doing Business as Industrial Lithographers, Appellees. Transcript of Record. Appeals From the United States District Court for the Southern District of California, Central Division.

Filed: March 10, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 15923.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. H. TROWLER, doing business as STANDARDS MAPS,
Appellant,

vs.

M. PENN PHILLIPS and M. PENN PHILLIPS, doing business as M. PENN PHILLIPS ASSOCIATES; WESTERN WOODS ASSOCIATES, WILLIAM HARWICK, JOHN KAGAN and BERT B. BRANT, doing business as HARWICK, KAGAN & BRANT; FRED W. AUSTIN, WILLIAM R. BLUMFIELD and HAROLD W. SIEDE, Copartners, doing business as INDUSTRIAL LITHOGRAPHERS,

Appellees.

Appeals From the United States District Court for the
Southern District of California, Central Division.

BRIEF OF APPELLANT.

MELVILLE B. NIMMER,
233 South Beverly Drive,
Beverly Hills, California,
Attorney for Appellant.

FILED

MAY 20 1958

PAUL P. O'BRIEN, CLERK



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No. 15923.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. H. TROWLER, doing business as STANDARDS MAPS,
Appellant,

vs.

M. PENN PHILLIPS and M. PENN PHILLIPS, doing business as M. PENN PHILLIPS ASSOCIATES; WESTERN WOODS ASSOCIATES, WILLIAM HARWICK, JOHN KAGAN and BERT B. BRANT, doing business as HARWICK, KAGAN & BRANT; FRED W. AUSTIN, WILLIAM R. BLUMFIELD and HAROLD W. SIEDE, Copartners, doing business as INDUSTRIAL LITHOGRAPHERS,
Appellees.

Appeals From the United States District Court for the
Southern District of California, Central Division.

BRIEF OF APPELLANT.

Jurisdiction.

These are consolidated actions for copyright infringement. [R. 38.] Jurisdiction of the District Court was invoked under 28 U. S. C. Sec. 1338(a) on the ground that the causes arise under the Copyright Laws of the United States. [R. 3, 8, 23, 28.] Judgments were entered December 3, 1957 [R. 49, 52, 55] and February 27, 1958. [R. 83.] Notices of Appeal were filed December 31, 1957 [R. 55-56] and March 4, 1958. [R. 83.] This Court has jurisdiction under 28 U. S. C. Sec. 1291.

Statement of the Case.

Pleadings. These are four consolidated [R. 38] actions for copyright infringement. Three of the actions (211-57-HW, 219-57-HW, 221-57-HW) allege infringement of Appellant's copyrighted maps entitled "Hesperia". [R. 5, 10, 30.] One of the actions (179-57-HW) alleges infringement of Appellant's copyrighted maps entitled "Antelope Valley, Portion of Kern County—San Bernardino County." [R. 25-26.] Appellees filed Answers [R. 14, 11, 32, 34] and Appellee in action 211-57-HW also filed two Counterclaims [R. 19-20.] However, subsequently the aforesaid Counterclaims were dismissed without prejudice by stipulation of the parties. [R. 46.]

Affidavit of Appellant. At a Pre-trial Conference the Federal District Court ordered Appellant to prepare and file an Affidavit as to his method of preparing the maps involved in all of the said actions. In accordance with said order, Appellant filed such an Affidavit on October 22, 1957, under the title "Affidavit of Charles H. Trowler." [R. 39-42.]

Motions for Summary Judgment. Subsequent to the filing and serving of the aforesaid Affidavit of Charles H. Trowler, Appellees in actions 211-57-HW, 219-57-HW and 221-57-HW made a Motion to Dismiss, for Judgment on the Pleadings and for Summary Judgment. [R. 44.] The District Court granted such Motion. [R. 45-46.] Thereafter, Appellee in action number 179-57-HW made a motion for Summary Judgment [R. 57-59], and the District Court granted such Motion. [R. 77.]

Findings, Conclusions and Judgment. Findings of Fact, Conclusions of Law and Judgment were entered on December 3, 1957 [R. 47-49, 50-52, 53-55] and February 27, 1958. [R. 81-83.] With respect to the Appellant's

map of Hesperia (the subject of actions 221-57-HW, 219-57-HW, 211-57-HW) the District Court found that Appellant "added nothing to the map of whose infringement he complains, that was original or novel" [F. IV], and concluded that such map "is not entitled to copyright under the Copyright Laws of the United States, Title 17 U. S. C. 1 *et seq.* for want of original work." [C. I.] With respect to the map of Antelope Valley (the subject of action 179-57-HW) the District Court found that said map "lacks sufficient originality resulting from the independent effort of the plaintiff to entitle it to be copyrighted" [F. I.] and concluded that Appellant "has no valid copyright" upon such map. [C. I.] Thus, with respect to each of the actions herein consolidated, the District Court's findings and conclusions related solely to the copyrightability of Appellant's maps.

Specifications of Error.

1. The District Court erred in granting Appellees' Motion for Summary Judgment in each of the actions herein consolidated.

2. The District Court erred in concluding, as a matter of law, that the maps which Appellant complains were infringed in each of the actions herein consolidated are not entitled to copyright under the Copyright Laws of the United States for want of original work.

3. The District Court erred in finding that the facts set forth in Appellant's Affidavit dated October 18, 1957 [R. 39-42] did not constitute original work, which would entitle Appellant to copyright.

ARGUMENT.

I.

Introduction.

The District Court in its Findings of Fact for each of the actions herein consolidated [R. 47-48, 50-51, 53-54, 82] has, in effect, found to be true the statements of fact set forth in Appellant's Affidavit dated October 18, 1957 [R. 39-42], which Affidavit is hereinafter referred to as the Trowler Affidavit.*

The central issue presented by this appeal is whether under the facts set forth in the Trowler Affidavit the District Court was justified in finding that, as to the map of Hesperia, Appellant added nothing "that was original or novel," and that Appellant is not entitled to copyright in the map "for want of original work" [R. 48-49, 51, 54], and in further finding that the map of Antelope Valley "lacks sufficient originality resulting from the independent effort of the plaintiff to entitle it to be copyrighted." [R. 82.] The Trowler Affidavit indicates that Appellant engaged in three distinct processes in creating the maps in question. First, Appellant assembled a number of public domain maps and tract sheets and judiciously selected cer-

*The Findings of Fact in Civil Action 179-57-HW [R. 82] do not expressly repeat the allegations of fact set forth in the Trowler Affidavit. It is to be noted, however, that the Trowler Affidavit sets forth in detail the manner in which Appellant created a map of Hesperia, which is the subject matter of the infringement actions in 211-57-HW, 221-57-HW, and 219-57-HW. The action in 179-57-HW relates to the alleged infringement of a map of Antelope Valley. Since the District Court accepted the statements of fact in the Trowler Affidavit relating to the creation of the Hesperia map, it is to be assumed that the District Court likewise accepted as true the statement in the Trowler Affidavit that: "In preparing my map of Antelope Valley I followed substantially the same procedure as that set forth above, with respect to my map of Hesperia." [R. 42.]

tain elements from each of these documents, creating for the first time a combination of such elements into a single map of Hesperia. [R. 39-41.] Appellant then added certain additional elements to the map as a result of his personal observation. [R. 41.] Finally, Appellant drove extensively in the area and personally verified the accuracy of the elements contained in the map [R. 41-42] and made certain changes in the map as a result of such verification. [R. 42.] In determining whether the District Court erred in concluding, as a matter of law, that the maps in question are not entitled to copyright under the Copyright Law of the United States for want of original work, and in finding that the facts set forth in the Trowler Affidavit do not constitute original work, which would entitle Appellant to copyright, it will be helpful to examine the afore-said three-step process in two parts: first, Appellant's endeavors in selecting and combining public domain elements, and then Appellant's additions and verifications by personal observation.

II.

The Process of Selecting and Combining Diverse Materials Taken From the Public Domain Into a Single Map Constitutes Original Work so as to Entitle Such a Map to Copyright Protection Under the Copyright Laws of the United States.

Notwithstanding the facts set forth in the Trowler Affidavit as to the Appellant's work in selecting and combining diverse public domain materials into a single map [R. 39-41], the District Court, in granting summary judgment for Appellees, found that such a map is not entitled to copyright protection. This is the basic error of the decision below.

A. The Copyright Act Clearly Provides That an Original Combination of Public Domain Materials Is, in Itself, Capable of Copyright Protection.

The decision of the District Court is irreconcilable with the clear provisions of the Copyright Act, as set forth in 17 U. S. C., Sec. 7 which provides:

“Compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works.”

Under Section 7 of the Copyright Act, as quoted above, where public domain material is merely “republished”, then “new matter” must be included in order to render the work protectible under the Copyright Act. It is to be noted, however, that under Section 7 if the work constitutes a compilation, abridgment, adaptation, or arrangement of public domain works, then such work is entitled to copyright protection, notwithstanding the absence of “new matter.” The originality necessary to support a copyright for such a work is found not in the contribution of new matter, but rather in the labor involved in compiling (or abridging, adopting or arranging) works in the public domain. The Trowler Affidavit clearly establishes that Appellant compiled in his map material gathered from a number of public domain works. [R. 39-41.] Likewise,

the Trowler Affidavit indicates that Appellant's map constituted an abridgment, adaption, and arrangement of public domain works. [R. 39-41.]

B. The Principle That an Original Combination of Public Domain Materials Is in Itself Capable of Copyright Protection Has Long Been Accorded Judicial Recognition.

The basic principle of copyright law, which Appellant seeks to invoke herein, was recognized as early as 1845 when Mr. Justice Story stated in *Emerson v. Davies*, 8 Fed. Cas. 615, 618, No. 4438 (C.C.D. Mass., 1845):

"The question is not whether the materials which are used are entirely new, and have never been used before; or even that they have never been used before for the same purpose. The true question is, whether the same plan, arrangement and combination of materials have been used before for the same purpose or for any other purpose. If they have not, then the plaintiff is entitled to a copyright, although he may have gathered hints for his plan and arrangement, or parts of his plan and arrangement from existing and known sources. He may have borrowed much of his materials from others, but if they are combined in a different manner from what was used before, and *a fortiori* if his plan and arrangement are real improvements upon the existing modes, he is entitled to a copyright in the book embodying such improvement."

The work of the Appellant in compiling and arranging his map, as described in the Trowler Affidavit [R. 39-42] clearly brings his work within the above quoted principle. The Appellant has arranged and combined materials found elsewhere in a manner that constitutes "real improvements upon the existing modes," in that prior to Appellant's work no map of Hesperia was available to the

public. [R. 39.] This same principle was recognized more recently by the California Supreme Court in *Stanley v. Columbia Broadcasting System, Inc.*, 35 Cal. 2d 653, 664, 221 P. 2d 73, 79 (1950), where it is stated:

“An author who takes existing materials from sources common to all writers, arranges and combines them in a new form, giving them an application unknown before, is entitled to a copyright, notwithstanding the fact that he may have borrowed much of his materials and ideas from others, provided they are assembled in a different manner and combined for a different purpose, and his plan and arrangement are a real improvement upon existing modes; for the labor of making these selections, arrangements and combinations has entailed the exercise of skill, discretion and creative effort.”

The above principle has been recognized in numerous copyright cases, wherein a work consisting of a combination or compilation of materials taken from public domain records has been recognized as protectible. Thus, the following cases have held the indicated works to be protectible: *New Jersey Motor List Company v. Barton Business Service*, 57 F. 2d 353 (D.N.J., 1931): A list of names, addresses and other information selected from the registration records of the State Commissioner of Motor Vehicles; *Real Estate Register, Inc. v. Baird*, 97 N. Y. S. 2d 868, 85 U.S.P.Q. 223 (1950): A “Real Estate Register” containing information about real estate obtained from public records; *Chain Store Business Guide, Inc. v. Wexler*, 79 Fed. Supp. 726 (S.D.N.Y., 1948): Data obtained from telephone books; *Hanson v. Jaccard Jewelry Company*, 32 Fed. 202 (C.C.Mo., 1887): Listing of Civil War battles and statistical data obtained from public

records; *Hartfield v. Peterson*, 91 F. 2d 998 (2d Cir., 1937): Compilation of code phrases taken from existing sources; *Edwards & Deutsch Lithographing Company v. Boorman*, 15 F. 2d 35 (7th Cir., 1926): An interest and discount table taken from public domain material.

C. Prevailing Case Law Indicates That a Map Is Protectible if It Consists of a Selection From and Combination of Public Domain Documents.

The provisions of 17 U. S. C., Sec. 7, quoted *supra*, and the legal principles established in the above cited cases, are, of course, as applicable to maps as they are to other copyright material. Nevertheless, Appellees, in the Court below, relied largely on a map case which, it is submitted, is contrary to the mandate of Section 7 of the Copyright Act (17 U. S. C., Sec. 7, quoted *supra*), and is contrary to the principles of copyright law repeatedly applied by the courts in cases cited *supra* and *infra*. The map case relied upon by Appellees is *Amsterdam v. Triangle Publications, Inc.*, 189 F. 2d 104 (3d Cir., 1951). In this case the Court held that a map is not copyrightable unless the copyright claimant has personally surveyed the elements depicted in the map. Thus, the Court in the *Amsterdam* case in effect held that a compilation, abridgment, adaptation or arrangement of public domain materials in a work is not copyrightable unless such work also contains new matter obtained by personal observation. Yet, as indicated *supra*, 17 U. S. C., Sec. 7, clearly provides that a work shall be copyrightable notwithstanding the absence of "new matter" if it consists of "compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain." The *Amsterdam* Court stated that "The presentation of information available to everybody, such as is found on

maps, is protected only when the publisher of the map in question obtains originally some of that information by the sweat of his own brow." Thus, the *Amsterdam* Court did not attempt to limit the principle there invoked to maps, but applied it generally to "the presentation of information available to everybody." Yet, it is clear from the cases cited *supra* that information "available to everybody" may indeed be the subject of copyright where the copyright claimant selects and combines such information into a new compilation, abridgment, adaptation or arrangement. The *Amsterdam* case can only be reconciled with existing statutory and case law by the fact that the plaintiff in that action apparently did not seek to invoke the provisions of 17 U. S. C. Sec. 7.

However, Appellant need not rely merely on the provisions of Section 7 of the Copyright Act and numerous copyright cases in other fields. There are a number of copyright cases referring expressly to maps which support Appellant's position. Thus, in *Emerson v. Davies*, *supra*, the Court stated at page 619:

"A man has a right to the copyright of a map of a state or country which he has surveyed *or caused to be compiled from existing materials*, at his own expense or skill or labor, or money." (Emphasis added.)

Another early copyright case expressly indicated that public records may be the basis of a copyrightable map. Thus, in *Farmer v. Calvert Lithographing Company*, 8 Fed. Cas. 1022, No. 4651 (C.C.Mich., 1872), the Court stated at page 1026:

"But it is contended that boundaries of townships are not a legitimate subject of copyright—that they are fixed and defined by statute law, and that the marking of them down upon paper is but a transcrip-

tion in another form of the legal enactment. What is claimed in this regard is true in regard to all original materials from which maps are made, and that is that none of them are subjects of copyright—they are open to all, but no one has the right to avail himself of the enterprise, labor and expense of another in the ascertainment of those materials, and the combining and arrangement of them, and the representing them on paper.”

The principle that an author may obtain a valid copyright on a map where the information contained in such map is gathered from other publications, and not by direct observation, is further confirmed in the case of *Woodman v. Lydiard-Peterson Company*, 192 Fed. 67 (C.C.Minn., 1912), aff'd 204 Fed. 921 (8th Cir., 1913). In that case the Court found that the plaintiff had, in fact, contributed new matter to his map. However the Court indicated that the plaintiff's map would have been protectible even without such new matter. Thus, the Court stated at page 69:

“It is also suggested that there is nothing original in the map of the complainant; that he himself secured all his material, not from original research, but from other publications. The fact that he did secure all this material from other publications which were not copyrighted, does not, to my mind, prevent him from getting a copyright upon this map, if it constitutes a new arrangement of old materials; and that this map does constitute a new arrangement of old material I think is apparent. It contains some parts of Carver County; *it contains more than had appeared upon any one piece of paper or map of that character; it is a combination of the Government and other maps.*” (Emphasis added.)

Here, again, the factual similarity to the present case is apparent. Appellant's map of Hesperia also "contains more than had appeared upon any one piece of paper or map of that character; it is a combination of the Government and other maps." [R. 39-41.]

In *General Drafting Company, Inc. v. Andrews*, 37 F. 2d 54 (2d Cir., 1930), the plaintiff was held to have a copyrightable map, although none of the elements contained therein were discovered by plaintiff's direct personal observation after he had originally been informed of them either through other documents or through personal interviews with engineers. The plaintiff, in the *General Drafting* case, followed a process somewhat similar to that of the Appellant in the present case, in that he made a large tracing of assembled section maps, but selected only such information as he thought would be of use to motorists. That is, he selected highways, rivers, town, state lines, etc. In holding that the plaintiff had achieved a copyrightable map, the Court stated at page 55:

"The elements of a copyright consists in the selection, arrangement, and presentation of the component parts."

The case of *Christianson v. West Publishing Company*, 149 F. 2d 202 (9th Cir., 1945), although cited in the District Court's Conclusions of Law [R. 49, 51, 54], does not support Appellees' position. In the *Christianson* case the Court held that the plaintiff's map was not copyrightable. However, it is to be noted that in that case the plaintiff slavishly copied an outline map of the United States, containing state boundaries. Obviously, this contains no creative element of selection, arrangement or presentation. The fact that the plaintiff in the *Christianson* case also evolved a color scheme is not of importance,

since the Court found that the defendant had not copied from the plaintiff, but had evolved its own color scheme.

Maps have been held to be "compilations," or "arrangements" within the meaning of 17 U. S. C., Section 7 (formerly Sec. 6). (*General Drafting Company, Inc. v. Andrews, supra.*) Yet, if the judgments below are here affirmed the provisions of Section 7, at least in its application to maps, will, for all practical purposes, become a dead letter. This would be directly contrary to a clearly expressed Congressional intent. Moreover, such a decision would wreak havoc in the map industry, which generally relies upon the provisions of Section 7. It is, perhaps, more important that the provisions of Section 7 be applied in the map industry than in other areas, since, as has been noted, "in the case of maps of compendia . . . later works will necessarily be anticipated." (*Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F. 2d 49, 53 (2d Cir., 1936).)

III.

Even if "New Matter" Were Required in Order to Render a Map Copyrightable, Appellant Has, in Fact, Contributed Such "New Matter."

A comparison of the facts set forth in the Trowler Affidavit [R. 39-42] and the facts indicated in the opinions in *General Drafting Company, Inc. v. Andrews, supra* (wherein plaintiff's copyright was upheld), and in *Amsterdam v. Triangle Publications, Inc., supra*, and *Andrews v. Guenther*, 60 F. 2d 555 (S. D. N. Y., 1932), cited by Appellees in the District Court, indicates that Appellant, in the present case, contributed more original material by direct observation than did the plaintiff in any of the above cited cases. Appellant, by his own di-

rect, personal observation, noted the location of the old historical hotel, the golf course, the Chamber of Commerce Building, the Community Hall, the Fire Station, and the proposed hotel site, and in each case, by such direct observation and by his ability as a map maker indicated the location of each of these items in his map. [R. 41.] He also determined the section numbers by his own computations based upon the townships and ranges specified in the San Bernardino County maps. [R. 41.] Appellant also drove extensively in the area and personally verified the accuracy of the elements contained in the map [R. 41-42] and made certain changes in the map, as a result of such verification. [R. 42.] In the *General Drafting* case none of the material contained in plaintiff's map was first discovered by him by direct, personal, observation. Yet plaintiff was held to have a copyrightable map. In the *Amsterdam* case the plaintiff did not, in the first instance, obtain any material contained in his map from direct, personal, observation.

“With the exception of the names of the few very small secondary roads, *which were obtained from real estate developers*, all the information shown on the plaintiff's map came from maps already in existence . . .” (Emphasis added.) (*Amsterdam v. Triangle Publications, Inc.*, *supra*, at p. 105.)

It is important to note that in copyright cases the courts will not take on the role of judging the artistic merit or value of an author's contribution. As was stated in *Alfred Bell & Company, Ltd. v. Catalda Fine Arts, Inc.*, 191 F. 2d 99, 102, 103 (2d Cir., 1951):

“A copy of something in the public domain will support a copyright if it is a distinguishable variation . . . No matter how poor artistically the

author's addition, it is enough if it be his own. *Bleistein v. Donaldson Lithographing Company*, 188 U. S. 239, 250."

Appellees can hardly claim that Appellant's map is indistinguishable from the array of public domain works upon which it was based. The mere fact that no single map, prior to Appellant's map, contained all of the features set forth in Appellant's map [R. 39] constitutes Appellant's map a "distinguishable variation" of prior works. Moreover, the question of whether an author has made an original contribution to a work is an issue of fact, which should not be determined upon motion for summary judgment. (*Arnstein v. Porter*, 154 F. 2d 464 (2d Cir., 1946), cert. den. 330 U. S. 851 (1947); *Malkin v. Dubinsky*, 146 Fed. Supp. 111 (S. D. N. Y., 1956).)

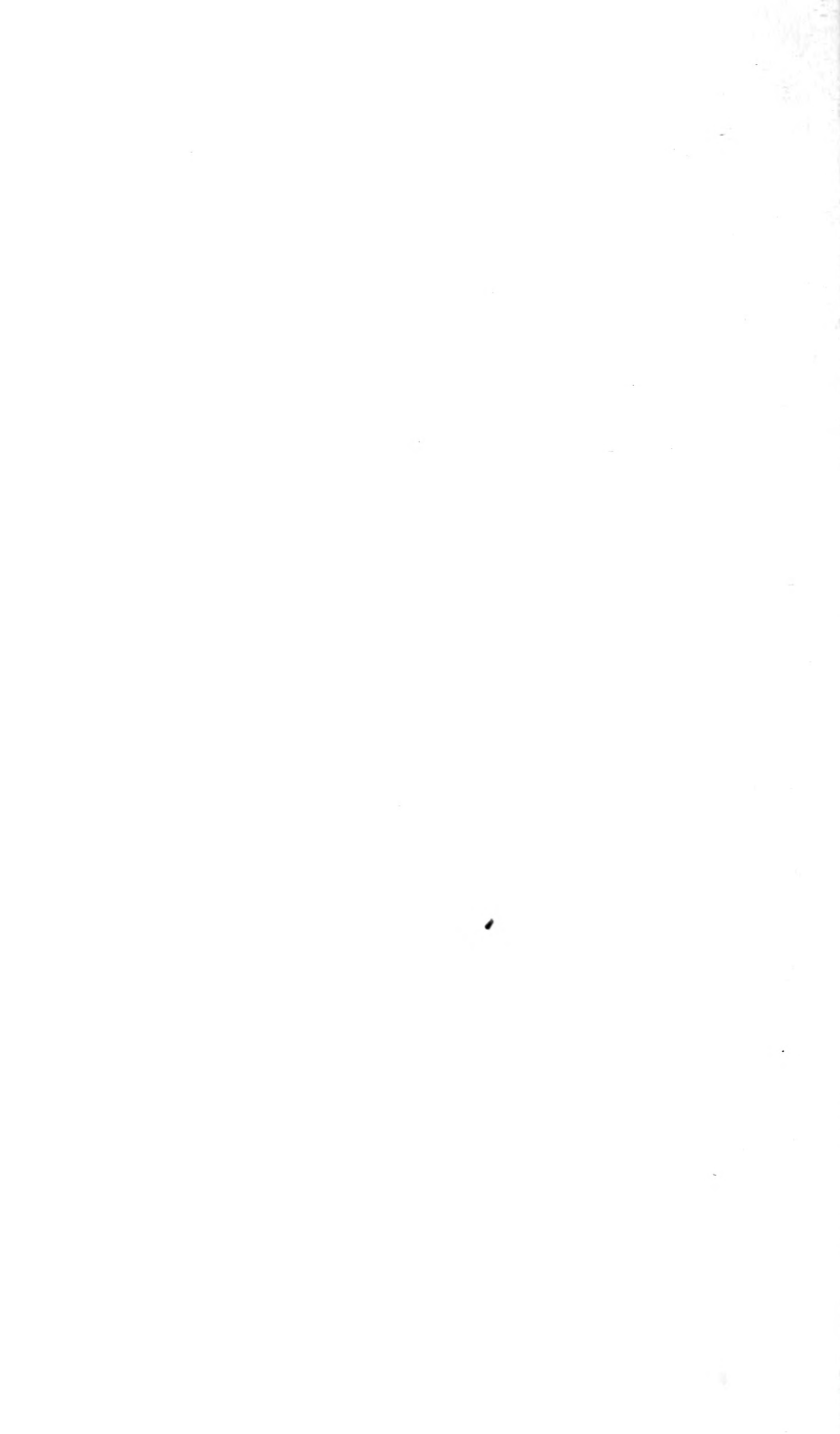
Conclusion.

For the foregoing reasons Appellant submits that the decision of the District Court should be reversed.

Respectfully submitted,

MELVILLE B. NIMMER,

Attorney for Appellant.



No. 15923

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. H. TROWLER, doing business as STANDARD MAPS,
Appellant,

vs.

M. PENN PHILLIPS and M. PENN PHILLIPS, doing business as M. PENN PHILLIPS ASSOCIATES; WESTERN WOODS ASSOCIATES; WILLIAM HARWICK, JOHN KAGAN and BERT B. BRANT, doing business as HARWICK, KAGAN & BRANT; FRED W. AUSTIN, WILLIAM R. BLUMFIELD and HAROLD W. SIEDE, Copartners, doing business as INDUSTRIAL LITHOGRAPHERS,

Appellees.

Appeals From the United States District Court for the
Southern District of California, Central Division.

Brief of Appellees, M. Penn Phillips and M. Penn Phillips, Doing Business as M. Penn Phillips Associates; Western Woods Associates; William Harwick, John Kagan and Bert B. Brant, Doing Business as Harwick, Kagan & Brant.

KAPLAN, LIVINGSTON, GOODWIN & BERKOWITZ,

By FRANK MANKIEWICZ,

270 North Canon Drive,
Beverly Hills, California,

Attorneys for Appellees.

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Statement of Pleadings and Facts Re Jurisdiction.

PLEADINGS: Complaint in 211-57-HW [R. 3]; Complaint in 219-57-HW [R. 7]; First Amended Complaint in 221-57-HW [R. 27]; Answer and Counterclaim in

211-57-HW [R. 14]; Answer in 217-57-HW [R. 11]; Answer in 221-57-HW [R. 32]; Affidavit of Plaintiff-Appellant [R. 39]; Motion to Dismiss, for Judgment on the Pleadings and for Summary Judgment in 211-57-HW, 221-57-HW and 219-57-HW [R. 44]; Stipulation and Order for Dismissal of Counterclaims in 211-57-HW [R. 46]; Findings of Fact, Conclusions of Law and Judgment in 211-57-HW [R. 47]; Findings of Fact, Conclusions of Law and Judgment in 219-57-HW [R. 50]; Findings of Fact, Conclusions of Law and Judgment in 221-57-HW [R. 53]; Notice of Appeal in 211-57-HW, 219-57-HW and 221-57-HW [R. 55].

JURISDICTION: Four actions for copyright infringement are herein consolidated [R. 38]. Jurisdiction of the District Court was invoked under 28 U. S. C. 1338(a), and this Court has jurisdiction under 28 U. S. C. 1291.

ARGUMENT.

I.

Introduction.

The recitals in Appellant's affidavit [R. 39], filed pursuant to the Court's order at the pre-trial conference [R. 38], assumed for the purpose of these Appellees' motions to be true, and the applicable rules of law require an affirmation of the judgments in the District Court. Appellant correctly states the central issues presented by this appeal (Appellant's Brief 4) as whether, under the facts set forth in Appellant's affidavit, the District Court was justified in finding that nothing original or novel was contributed by Appellant and whether, consequently, Appellant is not entitled to copyright in the map "for want of original work" [R. 48-49, 51, 54]. Appellant's brief recites that he "judiciously selected" certain elements from each of the public domain maps which were his only source, added certain additional elements as a result of his personal observation, "drove extensively" in the area and "personally verified" the accuracy of the elements contained in the map, and made certain changes in the map as a result of such verification (Appellant's Brief 4, 5). In analyzing the effect to be given Appellant's efforts in creating the document of whose infringement he complains, it would be helpful to consider, in Appellant's own language wherever possible, the precise nature of his "judicious selection," additional elements, personal verification, and the making of certain changes.

II.

Appellant's Affidavit Shows on Its Face That He Performed No Significant Original Work in Preparing His Maps, but on the Contrary, Copied It From Public Domain Material.

Appellant's affidavit [R. 39] sets forth clearly enough his procedure in compiling his maps, and nowhere contains any substantial indication that anything original or novel was created by him, to wit:

1. Appellant indicated that he purchased a book of recorded tract sheets containing fifty-two sheets of subdivision maps, of record in the office of the Recorder of the County of San Bernardino, fifty-five sheets describing the county road system, a map of San Bernardino County and various other maps issued by the United States Government, the State of California and the Atchison, Topeka and Santa Fe Railroad. Except for the railroad maps, all of this material was published by the Federal or State Government, or was a matter of public record. Appellant then took all of the recorded tract maps and placed them together to form one giant map [R. 39 and 40].

2. Appellant recites that he had to determine where the boundaries of sections occurred in order to fix the point of joinder of the individual tract maps, yet the individual tract maps of the area, as of every approved subdivision tract map, have clearly indicated thereon, as Appellant's affidavit sets forth, lot numbers and repeated street names, so that the boundaries of each can be determined very simply by observation [R. 40].

3. It appears from Appellant's affidavit [R. 40-41] that Appellant added nothing to the actual maps themselves but instead only eliminated certain material which was on the existing recorded tract maps. Surely it takes

no great effort or originality to include the name of a street only once [although in fact, Appellant's Exhibit 1 contains the names of many streets repeated three or four times: *e.g.*, "Lemon Street" is repeated three times, "Muscatel Street," "Mauna Loa Street" and "Manzanita Street" are each repeated four times, "Palm Street" is repeated three times within one section, "Mojave Street" is repeated five times, once as "Mojave Road," all despite Appellant's claim to have regularized the naming of streets], or to eliminate the numbers of lots, the measurements of the lots, the lot lines, easements, pipe lines and curbs. Appellant surely cannot claim to have exercised originality in the process of retaining some of these features and eliminating others.

4. Except for the sight location of the Old Hotel, the golf course, the Chamber of Commerce Building, the County Hall, the Fire Station and the proposed hotel site, Appellant admits that he obtained all of his information by taking material from other maps [R. 41]. As to these latter appropriations, he relied on his personal observation, but did not indicate that he placed them any more accurately than that [R. 39]. Appellant recited that he is an experienced mapmaker and yet it appears that he verified the material taken from other maps only by comparing the scale distances with his automobile speedometer, and it is significant that he found no variance sufficient to cause him to alter, by so much as one-tenth of a mile, the distances he took from the public record maps [R. 42]. Despite the claim in Appellant's brief (Appellant's Brief 5) that Appellant "made certain changes in the map as a result of such verification," it does not appear from Appellant's affidavit that any changes were made other than those set forth in Paragraph 7 of Appellant's affidavit [R. 42] which are so trifling as to be inconsequential.

5. In short, Appellant's "judicious selection" and arrangement comes down to an inconsistent elimination of certain repetitious naming of streets and the location, by eye, of a few well-known places not included in the tract maps, all subject only to the readings of an ordinary automobile speedometer, a precision tool hitherto little known to map makers. What Appellant did, it appears, is a routine cut-and-paste job on existing public domain material. As it was said in *Amsterdam v. Triangle Publications, Inc.*, 189 F. 2d 104, 106 (3d Cir., 1951):

"Is this exercise of judgment and discretion by the plaintiff the type of original work that is intended to be protected by the Copyright Act? I think not."

III.

The Protection of the Copyright Statutes Does Not Extend to Appellant's Maps, Where by His Own Admission, Virtually All of the Material Was Taken From Other Maps and Combined Without Further Original Research.

A. Prevailing Case Law Indicates That in Order for a Map to Be Copyrightable, the Mapmaker Must Originally Obtain More Than a Modicum of the Information Contained Thereon by Original Work.

1. The case of *Amsterdam v. Triangle Publications, Inc.*, *supra*, is squarely in point. Indeed, it would be difficult to find a set of facts closer to those in the case at bar. In the *Amsterdam* case, plaintiff published and copyrighted in 1932 a map of Delaware County, Pennsylvania, a county which includes suburban Philadelphia. In 1946, the Philadelphia *Inquirer* published the plaintiff's map. The defendant newspaper conceded the copying and the sole question presented by plaintiff's appeal from a

dismissal below was the copyrightability of the plaintiff's map. Among the findings of fact were the following:

(a) The plaintiff studied every map of Delaware County he could find. Plaintiff made no actual survey or investigation of roads, county lines, township lines, or railroad lines; all this information was obtained from public records or other maps.

(b) Highway numbers were obtained from the State Highway Department.

(c) All the information shown on the plaintiff's map came from maps already in existence, *although none of this information had previously been entered on any one map*. The only exceptions were the names of a few small secondary roads, which were obtained from real estate developers.

“ . . . the plaintiff spent considerable time and effort to assemble and prepare this information for publication, but did very little, if any, original work.” (*Amsterdam v. Triangle Publications, Inc.*, *supra*, at 105.)

2. In reciting with approval a part of the opinion of the District Court Judge in the *Amsterdam* case below (93 Fed. Supp. 79 (U. S. D. C. E. D. Penna. 1950)), the Court said:

“ ‘To be copyrightable a map must be the result of some original work. *Andrews v. Guenther Pub. Co.*, D. C., 60 F. 2d 555, 557; *General Drafting Co., Inc. v. Andrews, et al.*, 2 Cir., 37 F. 2d 54, 56; 34 Am. Jur. 454-455; 18 C. J. S., Copyright and Literary Property, §116, p. 233.

“ ‘*The actual original work of surveying, calculating and investigating that was done by the plaintiff in*

order to make his map was so negligible that it may be discounted entirely.

“What the plaintiff did was to study the United States Geological Survey Maps, the Pennsylvania Department of Highways Maps, the maps prepared and owned by the various townships and municipalities, and all other maps which he could find. *Primarily, he studied the maps published by governmental authorities.* He then prepared, from the information shown on these maps, a large map of Delaware County. From this large map, he next designed and published the small map involved in this case.

“To make his map, *the plaintiff had to determine only what information he was going to use from other maps, the emphasis to be given to that information and the coloring scheme and symbols he was going to use.* When he finished, his map by comparison was a new map that contained some information that was not on any one of his base maps but was collectively on all of these maps.

“Is this exercise of judgment and discretion by the plaintiff the type of original work that is intended to be protected by the Copyright Act? I think not.

“The location of county lines, township lines and municipal lines is information within the public domain, and is not copyrightable. *Christianson v. West Pub. Co., 9 Cir., 149 F. 2d 202, 203; Sawyer v. Crowell Pub. Co., D. C., 46 F. Supp. 471, 474. Likewise, information in government publications is within the public domain and not subject to copyright.* *Andrews v. Guenther Pub. Co., supra.* Nor can the plaintiff copyright the arbitrary color schemes, symbols or numbers that he uses on his map. *Christianson v. West Pub. Co., D. C., 53 F. Supp. 454, 455.*

“All that remains is the plaintiff’s method of presenting this information. The presentation of ideas in the form of books, movies, music and other similar creative work is protected by the Copyright Act. *However, the presentation of information available to everybody, such as is found on maps, is protected only when the publisher of the map in question obtains originally some of that information by the sweat of his own brow.* Almost anybody could combine the information from several maps onto one map, but not everybody can go out and get that information originally and then transcribe it into a map.

“*The plaintiff’s reputation as a qualified map maker cannot make copyrightable maps for him. He, or his agent, must first do some original work, get more than an infinitesimal amount of original information.* With no reflection whatsoever upon the plaintiff’s ability as a map maker or upon other maps published and copyrighted by the plaintiff, it seems to me that the plaintiff’s map entitled “Map of Delaware County, Pa.” is, for lack or [sic] original work, not subject to copyright.’

“We think there is no doubt that *in order for a map to be copyrightable its preparation must involve a modicum of creative work.* Judge Knox of the District Court for the Southern District of New York so held in *Andrews v. Guenther Pub. Co.*, 1932, 60 F. 2d 555, after reviewing the authorities and we have been referred to no authority to the contrary. Moreover we regard the rule as in accord with the spirit and intent of Article I, Section 8, clause 8, of the Constitution which is the basic authority for the granting of copyrights. Applying the rule to the facts of this case the district court did not err in concluding that the necessary amount of creative work to justify the copyright of the plaintiff’s

map had not been shown. It follows that the district court properly dismissed the complaint.” (Emphasis added; *Amsterdam v. Triangle Publications, Inc.*, *supra*, at 106.)

3. Except for the case of *Christianson v. West Publishing Co.*, 149 F. 2d 202 (9th Cir., 1945), there are no map cases precisely on point in the Ninth Circuit. However, the *Christianson* case was cited with approval in the *Amsterdam* case, *supra*, and affirmed a judgment of dismissal for the defendant on the grounds, at least in part, that the plaintiff’s map did not constitute copyrightable material, in that none of its elements originated with the plaintiff.

The case of *Andrews v. Guenther Publishing Co.*, 60 F. 2d 555 (D. C. S. D. N. Y., 1932), cited by Appellant (Appellant’s Brief 12). relied on in the *Amsterdam* and *Christianson* cases, *supra*, is very much in point. In this case, a complaint by plaintiff was dismissed on the following set of facts:

Plaintiff prepared, published and copyrighted, and defendant admitted copying, a map of North America with an outline of the continents, international boundaries and plaintiff’s own selection of over one hundred of the most important cities, which he designated by different symbols according to their population. The chief point of controversy was whether or not the plaintiff’s map could be the subject of copyright. After an analysis of the facts of the case of *General Drafting Co. v. Andrews*, 37 F. 2d 54 (2nd Cir., 1930), *infra*, the court determined that, whereas a considerable amount of original work had been done by the successful plaintiff in the *General Drafting Co.* case, it had not been done to prepare the map in

question. It was, consequently, not a valid subject of copyright. Plaintiff in the *Guenther Publishing Co.* case performed considerably more original work than Appellant Trowler, and yet it was held insufficient. Plaintiff in the *Guenther Publishing Co.* case took a United States Geographical Survey, prepared from that an outline map of North America, made a tracing from a photostat of the Geographical Survey of the Great Lakes and international boundary lines, eliminated many indentures in the coast line and then placed thereon what he considered to be the principal cities of North America, locating the positions of most of the cities by eye from the original Geographical Survey map, and added five other cities by eye. Despite all this original work, the Court found insufficient originality:

“The amount of original work done by plaintiff in the instant case, was in no way comparable to that done by the plaintiff in the [General Drafting Co.] case.

“. . . [the] map is not a valid subject of copyright. To be entitled to copyright, a composition must be the result of some original work.” (*Andrews v. Guenther Pub. Co.*, *supra*, at 557.)

4. The recent case of *Marken and Bielfeld, Inc. v. The Baughman Co.* (U. S. D. C. E. D. Va., 1957)* is squarely in the line of map cases discussed earlier. Plaintiff's agent compiled a map by reducing United States Geological Surveys, placed certain towns thereon and drew in roads from various other published and public domain maps.

*The opinion in this case, Civil Action No. 2376, was obtained from the Clerk of the District Court, and counsel is unable to find any citation in the Federal Supplement.

In determining "whether the maps relied upon contained sufficient original work to be protected by copyright," the Court said:

" . . . the controlling principles were applied in *General Drafting Co. v. Andrews*, . . . *Andrews v. Guenther Pub. Co.*, . . . *Amsterdam v. Triangle Publications Inc.*, . . . and *Crocker v. General Drafting Co.*, . . . These appear to be leading cases upon the subject of the amount of originality required to meet the test as to whether the map is a proper subject of copyright. While it is not required that the compilation be the sole product of the maker in acquiring a reasonably substantial the compilation of information procured by others is required to make a map copyrightable. There must be originality resulting from the independent effort of the maker in acquiring a reasonable substantial portion of the information . . . As I view the evidence, [plaintiff] prepared his base map from material collected by others, with such omissions as he saw fit to serve the purpose desired. The reduction in size by the use of a mechanical instrument is not an original idea. The omission of towns, highways or other markings superfluous for his purpose is not an indication of originality. The free-hand location of highways between points does not constitute new information but merely the act of a draftsman in delineating such highways in a method suitable for his purpose. The record discloses no effort on his part to verify the correctness of the map by communicating with individuals or local agencies in the area affected . . . It is conceded that [plaintiff] made no personal inspection of any of the areas shown on the map. As indicated, the only significant changes made by [plaintiff] consisted of an adjustment of areas around Roanoke and Williamsburg,

first appearing on the 1951 map in order that those cities might be shown. Apparently this adjustment consisted only of a contraction or restriction of the portion of the outer edge of the map so as to bring into the picture these cities. It is therefore my conclusion that the map relied upon does not contain sufficient original work to be protected by the copyright."

B. The Map Cases Relied Upon by Appellant, to the Extent That They Are Offered to Support the Proposition That a Valid Copyright May Be Obtained on a Map Copied Virtually Entirely From Public Domain Maps, Do Not Support Appellant's Position.

1. Appellant relies upon the case of *Woodman v. Lydiard-Peterson Co.*, 192 Fed. 67 (C. C. Minn., 1912), *aff'd sub. nom. Lydiard-Peterson v. Woodman*, 204 Fed. 921 (8th Cir., 1913), in support of his position that a map maker may obtain a valid copyright where the information contained in his map is gathered from other publications, and not by direct observation (Appellant's Brief 11). It should be noted that even were this the holding of the *Woodman* case, which it is not, it is not a Court of Appeals decision, since the sole question on appeal was limited by stipulation of the parties to the question of the adequacy of the copyright notice (204 Fed. 921, 923). In the District Court, where the originality of Appellant's map-making was at issue (neither affirmed nor reversed on appeal), it appears that the plaintiff in *Woodman* performed far more original work than Appellant. Appellant quotes at some length, with emphasis, from the District Court opinion in *Woodman* (Appellant's Brief 11), but it appears that the opinion relies heavily for its decision for the plaintiff upon the fact that plaintiff, in fact, performed considerable original work. Im-

mediately following the excerpt from the District Court opinion in *Woodman* in Appellant's brief, appears the following language:

"It is not true to say that it does not contain any original feature that had not appeared in any map prior to this time. It does contain quarter section lines. These, to be sure, are to some extent the same as those which had appeared in the Dahl Map; but that was accidental. They appeared in the Dahl Map because the boundaries of farms and tracts of land happened to coincide with the boundaries of the quarter sections. But an examination of the Dahl Map shows that, wherever the boundaries did not coincide with the quarter section line, then the quarter section lines were omitted. This is an original feature which the defendant availed himself of when he copied the map.

"The complainant in his testimony specified some 38 features which he says were original in his map and did not appear in any other map unless it was in the government map. It was suggested by counsel, as I understood him, that the complainant had a right to copyright features which appeared upon the government map and did not appear upon any other map. I do not understand upon what basis that contention was made. I find nothing in the law to sustain it. On the contrary, it appears from section 7 of the Act of March 4, 1909, that there is an express provision that no copyright shall be obtained of any government publication. Therefore, eliminating from the 38 items specified by the complainant all those which had formerly appeared on the government map, there still remain quite a number of original features, which, so far as the evidence shows, did not appear upon any other map. I think it specially appears that a part of a road near Holdridge did not appear upon

the government map. The complainant also specified a lake in the southeast quarter of section 29, and said that the road across it was new. An examination of the government maps shows that to be the fact. While the government map does show two lakes, it shows no road across the narrowest point between them. Again, in section 1, town 116, the complainant testified that there was a road marked by a dotted line, which did not appear upon any other map. No evidence is produced to contradict that. So, in the northeast corner of the northwest quarter of section 35, town 117, there is a road on the section line; and I might go through the different specifications that complainant made and point out several more instances which were not contradicted by evidence of the defendant. *So I say that it is not true that there are no features at all in this map which are original with the complainant. These features are protected by the copyright.*" (*Woodman v. Lydiard-Peterson, supra*, at 69, 70.) (Emphasis added.)

2. The case of *General Drafting Co. v. Andrews*, 37 F. 2d 54 (2nd Cir., 1930), is also cited by Appellant (Appellant's Brief 12) for the proposition that original work is unnecessary in order to obtain a valid map copyright. But the court in the *Amsterdam* case did not hesitate to cite the *General Drafting Co.* case for the precise point of law upon which *Amsterdam* turned, to wit:

"To be copyrightable, a map must be the result of some original work, *Andrews v. Guenther, supra*; *General Drafting Co. v. Andrews . . .*" (*Amsterdam v. Triangle Publications, supra*, at 106.)

A close examination of the *General Drafting Co.* case seems to indicate that plaintiff there performed far more

original work than the Appellant in the case at bar. Indeed, *Amsterdam* is not the only case to point this out. In *Andrews v. Guenther, supra*, the *General Drafting Co.* case is referred to in support of the statement that:

“The cases in which copyrights on directories, digests, maps and other compilations have been upheld, all involved at least a modicum of creative work as distinguished from merely copying, which is entirely lacking from the case at bar.” (*Andrews v. Guenther, supra*, at 557.)

The court in the *General Drafting Co.* case outlined in detail the method by which plaintiff's map was created. It is important in this connection to note that plaintiff's maps were tourists' road maps designed for automobile drivers' use. It appeared that plaintiff obtained two sets of topographical maps from the Department of the Interior, and then obtained from personal interviews with county engineers in each county, detailed information concerning road conditions. Plaintiff then designated the condition of each road as a first, second or third class road insofar as automobile travel was concerned, and verified the actual physical condition of many of the roads by travel upon them. Then plaintiff took his assembled maps and proceeded, by a process of selection, to use only certain highways, towns, etc., as he thought would be of use to motorists. He then indicated the class of each road by a special marking and in order to accommodate the printed matter which he placed thereon, considerably varied road meanderings, shore lines, etc. The court concluded that:

“Comparison of base maps and sectional or detail maps with the finished product show a considerable amount of originality in preparation.” (*General Drafting Co. v. Andrews, supra*, at 56.)

C. The So-Called "Compilation" Cases Relied Upon by Appellant, Rest Upon the Performance of Considerably More Original Work and Variation Than Are Asserted in Appellant's Affidavit.

1. In the case of *Edwards Co. v. Boorman*, 15 F. 2d 35 (7th Cir., 1926), an interest and discount time teller was held to be a protectible work under the Copyright Statutes. An examination of the facts of the case seems to show, however, that the protected work was not a mere collection of previously published words, phrases and symbols, but was, in fact, held to be an original *book*, within the meaning of Section 5(a) of the Copyright Act and not, as claimed by Appellant, a "compilation, abridgement, adaptation, arrangement . . . or other version of words in the public domain" under the provisions of Section 7. It appears that the plaintiff in the *Boorman* case compared and arranged at some length a work furnishing, without computation, virtually all necessary information pertaining to time payments and discounts on commercial paper. Clearly, more original work was required than that performed by Appellant.

2. The case of *Hartfield v. Peterson*, 91 F. 2d 998 (2d Cir., 1937), is similarly distinguishable. There, the plaintiff, over several years, accumulated material from different codes and from various friends and associates. He wrote, rewrote, enlarged, amplified and expanded this material into a single cable and telegraphic code book, which included some 74,962 phrases, collected, interpolated and in many cases, apparently, originated by the plaintiff. There is hardly any basis for comparison of plaintiff's work in the *Hartfield* case and the work Appellant claims to have performed in this case.

3. The facts in the case of *New Jersey Motor List Co. v. Barton Business Service*, 57 F. 2d 353 (D. C. N. J., 1931) are inadequate to make any comparison. But it does appear that plaintiff, from lists of names, addresses and other information contained in applications to the State Division of Motor Vehicles, compiled its own list for advertising purposes, and it would appear that at least a considerable process of selection was involved, which would have required more effort and originality than in merely (and imperfectly) eliminating street names from published maps.

4. The case of *Hanson v. Jaccard Jewelry Co.*, 37 Fed. 202 (C. C. E. D. Mo., 1887) is similarly cited by Appellant (Appellant's Brief 8). The successful plaintiff in this case made a compilation of Civil War battles from "voluminous public documents" and arranged them chronologically and included the Union forces engaged in the battles and the casualties sustained. The plaintiff was sustained on grounds that such a compilation is a "valuable source of information and requires labor, care, and some skill in . . . preparation."

5. The case of *Chain Store Business Guide, Inc. v. Wexler*, 79 Fed. Supp. 726 (U. S. D. C. N. Y., 1948), relied upon by Appellant, similarly shows the exercise of considerable ingenuity, originality and selection not demonstrated by Appellant. Plaintiff in this case, from more than 1,800 telephone books, covering approximately 7,800 cities and towns throughout the United States, compiled business directories, classified as to particular trades.

" . . . names were secured in part from 1,816 telephone books covering approximately 7,800 cities and towns throughout the United States. A card index for each name appearing in any of its directories is kept by the plaintiff upon which is entered

not only the name and address, but other information including the names of the buyers for the stores, and this data is furnished for the use of its customers upon request, with changes of addresses, business names, etc., as and when such occurred. In addition thereto, forms of questionnaires or listings are sent to the various chains and independent stores at least once a year in which plaintiff requests further information such as headquarters address, number of stores in actual operation and also requesting that any errors in plaintiff's directory with respect to the particular chain or store be indicated so that correction may be made." (*Chain Store Business Guide v. Wexler*, at 726.)

That this is not only a greater degree of work than that performed by Appellant, but of a different kind entirely, is quite clear. The "compilation" cases underline the map cases which require considerable original work for copyrightability.

IV.

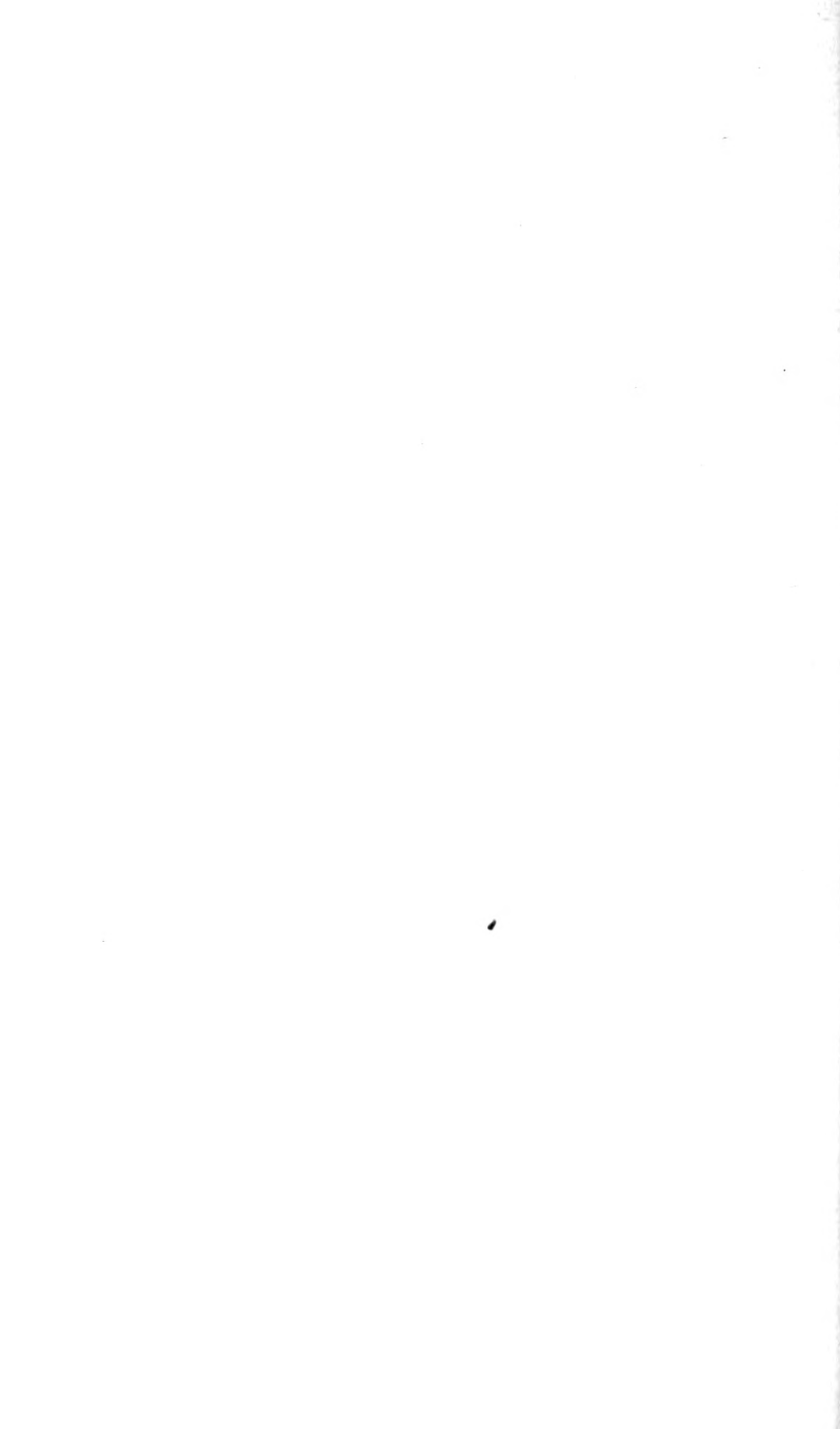
Conclusion.

On the basis of the facts set forth in Appellant's affidavit and the applicable principles of law, we respectfully submit that the judgment in this case should be affirmed.

KAPLAN, LIVINGSTON, GOODWIN
& BERKOWITZ,

By FRANK MANKIEWICZ,

Attorneys for Appellees, M. Penn Phillips, M. Penn Phillips doing business as M. Penn Phillips Associates; Western Woods Associates; William Harwick, John Kagan and Bert B. Brant, doing business as Harwick, Kagan & Brant.



No. 15923

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. H. TROWLER, doing business as Standard Maps,
Appellant,

vs.

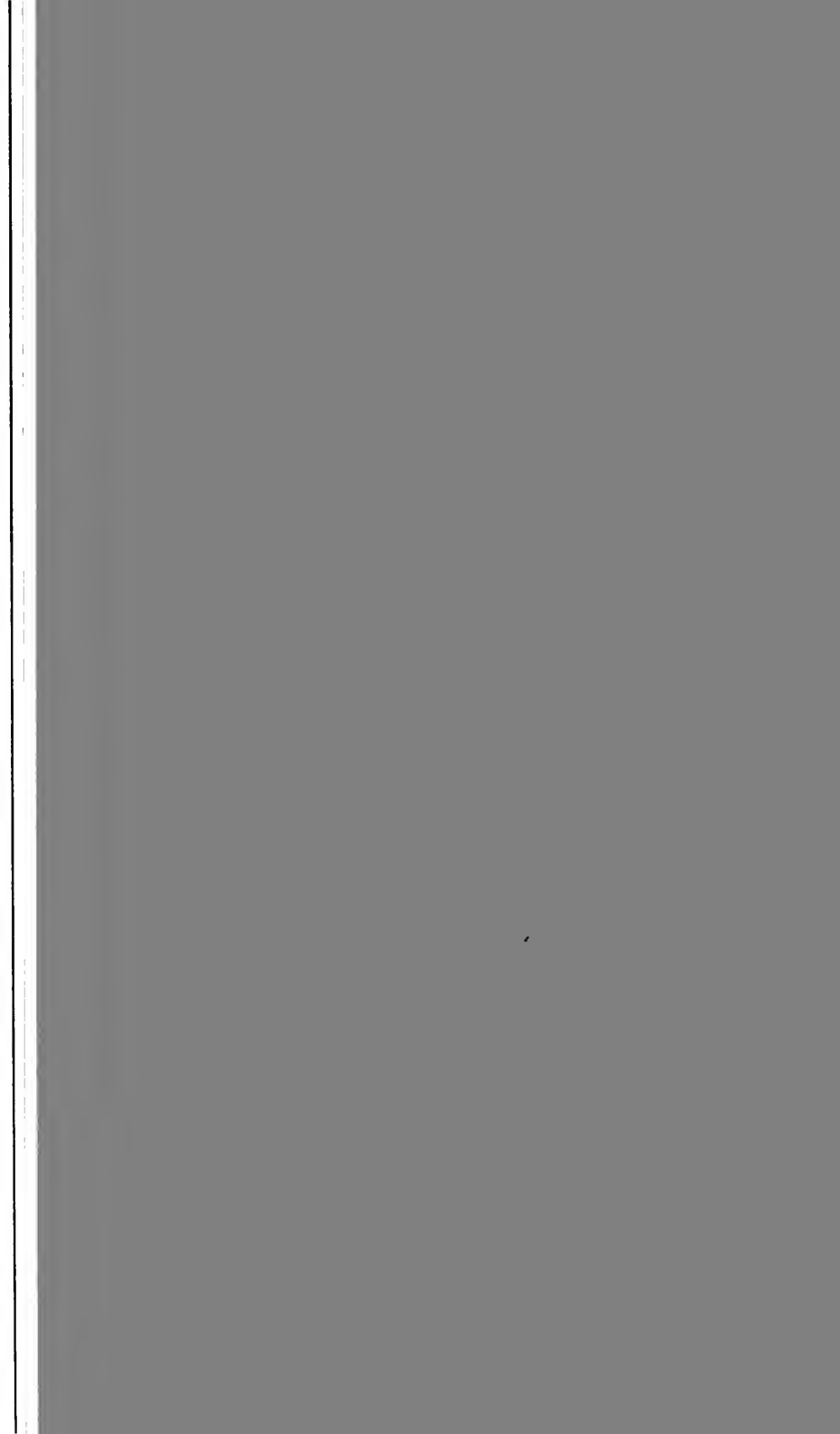
FRED W. AUSTIN, WILLIAM R. BLUMFIELD and HAROLD
W. SIEDE, co-partners doing business as Industrial
Lithographers,

Appellees.

APPELLEES' BRIEF.

PORTER C. BLACKBURN,
224 East Olive Avenue,
Burbank, California,

GEORGE R. MAURY,
3460 Wilshire Boulevard,
Los Angeles 5, California,
Attorneys for Appellees.



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No. 15923

IN THE

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FOR THE NINTH CIRCUIT

C. H. TROWLER, doing business as Standard Maps,
Appellant,

vs.

FRED W. AUSTIN, WILLIAM R. BLUMFIELD and HAROLD
W. SIEDE, co-partners doing business as Industrial
Lithographers,

Appellees.

APPELLEES' BRIEF.

Statement of Pleadings and Facts re Jurisdiction.

PLEADINGS: (1) First Amended Complaint [R. 23-27]; Answer thereto [R. 34-37]; Affidavit of Charles H. Trowler [R. 39-42]; Motion of Appellees Austin, Blumfield and Siede for summary judgment [R. 57-75]; Findings, Conclusions and Judgment [R. 81-83].

JURISDICTION: The appellees in this action have never conceded (albeit we realize federal jurisdiction can be neither conceded or stipulated if it does not exist) the jurisdiction of the District Court [R. 37, Separate Defense; R. 59-75, proceedings in Municipal Court]. However, since the cause below was decided entirely upon the question of the insufficiency of plaintiff's affidavit [R. 39-42], as to what he did in preparing the claimed copyrighted

maps, to entitle them to copyright, we do not here discuss the other questions relative to jurisdiction—they are affirmatively raised and require evidence. Insofar as the narrow issue on this appeal is concerned, Title 28, U. S. C., Sec. 1338(b), applies.

Statement of the Case.

We controvert only the generality of appellant's statement, and point specifically to the particular map involved herein (Case 179-57 HW) since such map is the one which depicts the Antelope Valley Area only—*not Hesperia* (App. Br. p. 4, footnote). It is obvious that these elements supplied to the Hesperia map by the plaintiff from his own observation [R. 41]:

“Location of Old Historical Hotel—Source: My personal observation; Golf Course—Source: my personal observation; Chamber of Commerce Building—Source: My personal observation; Community Hall—Source: My personal observation; Fire Station—Source: My personal observation; Proposed Hotel Site—Source: My personal observation,”

since they are all located on the Hesperia map, cannot have been (and are not) upon the Antelope Valley map as a result of the plaintiff's personal observation—or at all. Hence a basic distinction exists, pragmatically, between the two maps, and the plaintiff's averment that “In preparing my map of Antelope Valley I followed substantially the same procedure as that set forth above with respect to my map of Hesperia” must include only those elements in the work of compilation *not* referring to specific points *within* Hesperia.

ARGUMENT.

Plaintiff's Affidavit Insofar as It Pertains to the Antelope Valley Map Shows on Its Face Such Lack of Originality as to Defeat Its Copyrightability.

Eliminating, as we must, all discussion of elements and items on the Antelope Valley Map which have plaintiff's personal observation as their source, since there are none shown in plaintiff's affidavit [R. 39-42], we find that the following, stripped of verbiage, is all that the plaintiff did in preparing the Antelope Valley map:

(1) He purchased maps issued by various public authorities (Recorded Tract Sheets, Department of Interior Maps, California State Highway Division Maps). All the other sources [R. 39-40] apply specifically to the Hesperia area. "None of these maps contained any copyright notice" [R. 40].

(2) He joined them all together and "allowed for varying scales on different sheets" [R. 40].

(3) He made a free-hand drawing copy of the assembled sheets all to a uniform scale.

(4) He included streets as set forth in the tract sheets; he excluded lot numbers, lot measurements, lot lines, easements, pipelines, curbs, and repetitions of street names.

(5) As to the Antelope Valley map, since his procedure was "substantially the same" [R. 42], we assume for argument without admitting, that he added only: (a) Main Highway, (b) "Bear Valley Road" (if it appears on the Antelope Valley map), (c) Mojave River (if it also so appears) and that his source was the County Road System Map [R. 41], (d) he inserted Railroad Tracks, "Proper" Altitudes, and Certain Roads from the A. T. & S. F. Railroad Map [R. 41], and (e) "Certain Roads" from a Fed-

eral Government map [R. 41]. That is all, *at most*. He cannot have “evolved” section numbers from Townships and Ranges from the two San Bernardino County Maps [R. 41], since Antelope Valley is in Los Angeles County [R. 41]. This also, of course, applies to the listed “Lake—Source: San Bernardino County Maps” [R. 41]. And as previously mentioned, all personal observations noted were made only in Hesperia—for that map alone. Hence then the Antelope Valley map from plaintiff’s own affidavit, falls short, not only of sufficient originality to qualify for copyright, but of *any* originality.

A case much in point is *Marken and Bielfield, Inc. v. The Baughman Co.*, E. D. Va., June 17/57.*

There the Court said:

“As I view the evidence, Captain Gill prepared his base map from material collected by others, with such omissions as he saw fit to serve the purpose desired. The reduction in size by the use of a mechanical instrument is not an original idea. The omission of towns, highways or other markings superfluous for his purposes is not an indication of originality. The free hand location of highways between points does not constitute new information but merely the act of a draftsman in delineating such highways in a method suitable for his purpose. The record discloses no effort on his part to verify the correctness of the maps by communicating with individuals or local agencies in the area affected. * * * It is conceded that Captain Gill made no personal inspection of any of the areas shown on the map. As indicated, the only

*We obtained the opinion in this case (by Hon. Sterling Hutcheson, J.) from the Court, E. D. Va., but have been unable to locate any citation in the Fed. Supp. We will further check and advise the Court of our findings as soon as possible.

significant change made by Captain Gill consisted of an adjustment of areas around Roanoke and Williamsburg * * * in order that those cities might be shown. Apparently this adjustment consisted only of a contraction or restriction of the portion of the outer edge of the map so as to bring into the picture these cities."

This follows the view of the authorities, and specifically the general rule that, to be copyrightable, a work must contain originality.

General Drafting Co. v. Andrews, 37 F. 2d 54;

Andrews v. Guenther Pub. Co., 60 F. 2d 555;

Freedman v. Milnag Leasing Corp., 20 Fed. Supp. 802;

Crocker v. General Drafting Co., 50 Fed. Supp. 634;

Christianson v. West Pub. Co., 53 Fed. Supp. 454;
Aff'd. 149 F. 2d 202;

Amsterdam v. Triangle Publications, 189 F. 2d 104.

Conclusion.

On the facts in plaintiff's affidavit and on the principles of law which to us seem well established, we respectfully submit that the judgment in this case should be affirmed.

PORTER C. BLACKBURN,

GEORGE R. MAURY,

By GEORGE R. MAURY,

Attorneys for Appellees.



No. 15924 ✓

**United States
Court of Appeals**
for the Ninth Circuit

JACK J. WALLEY, Executor of the Estate of
Murrey London, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California
Central Division**

FILED
APR - 9 1958
PAUL P. O'BRIEN, CLERK

No. 15924

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

MILTON DAVIS,
408 So. Spring Street,
Los Angeles 13, California.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Asst. U.S. Attorney,
Chief, Tax Division;

REMBERT T. BROWN,
Assistant U.S. Attorney,
808 Federal Building,
Los Angeles 12, California;

CHARLES K. RICE,
Asst. U.S. Attorney General, Tax Division,
Dept. of Justice;

LEE A. JACKSON,
Attorney,
Dept. of Justice,
Washington 25, D. C.

United States District Court for the Southern District of California, Central Division

No. 313-57—WM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK JAY WALLEY, Executor of the Estate of
Murrey London,

Defendant.

COMPLAINT FOR COLLECTION OF
INTERNAL REVENUE TAXES

Plaintiff, United States of America, appearing herein by its attorneys, Laughlin E. Waters, United States Attorney; Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and Rembert T. Brown, Assistant United States Attorney, complains of defendant and alleges as follows:

I.

The plaintiff is, and at all times material hereto was, a corporation sovereign and body politic.

II.

This is an action of a civil nature arising under Sections 3670 and 3671 of the Internal Revenue Code of 1939 and Sections 7401 and 7403 of the Internal Revenue Code of 1954, and 28 U.S.C., Section 1340, authorized and requested by the Commissioner of Internal Revenue of the United States and

brought under the direction of the Attorney General of the United States. [2*]

III.

The defendant, Jack Jay Walley, is a resident of the Southern District of California and on October 25, 1954, was appointed executor of the estate of Murrey London, Deceased, which estate is now the subject of probate proceedings pending in the Superior Court of California, in and for the County of Los Angeles, No. 357,157.

IV.

Prior to his death on September 13, 1954, the decedent, Murrey London, operated a business under the name of the London Construction Company at 937 South Burlington Avenue, Los Angeles, California.

V.

The Commissioner of Internal Revenue assessed against the aforesaid Murrey London, doing business as London Construction Company, Federal Internal Revenue taxes of the type, for the taxable period, and in the amounts set forth below. The Collector of Internal Revenue for the 6th Collection District of California received the respective assessment lists showing the assessments of the aforesaid taxes on the dates shown below, on which dates liens of the United States of America arose against all property and rights to property of the taxpayer, as provided in Sections 3670 and 3671 of the 1939

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

Internal Revenue Code. Shortly after the receipt by the Director of each assessment list, notice of each tax assessed was given to the taxpayer and demand was made upon him for the payment of each tax so assessed, but only the amount of \$243.29 as set forth in paragraph VI hereinbelow has been paid. There remains due, owing and unpaid to the United States of America on each lien the sum shown in the last column, which represents the balance of the assessed tax plus subsequently accruing penalties and interest computed through March 8, 1957. Further interest accumulates on the total balance of assessed taxes, penalties and interest from said [3] date at the statutory rate of six per centum per annum. In addition, lien filing fees of \$5.00 have been incurred.

Type of Tax	Taxable Period	Amount Assessed	Assessment List Rec'd.	Balance Due
	4 Qtr.			
Withholding	1947	\$2,764.93	Feb. 24, 1948	\$4,264.90
Insurance	4 Qtr.			
Contributions ..	1947	338.70	Mar. 1, 1948	538.15
Unemployment	1947	187.19	Mar. 1, 1948	289.43
Additional				
Unemployment	1947	800.02	July 13, 1948	1,207.31
Insurance	1 Qtr.			
Contributions ..	1948	279.29	July 23, 1948	421.93
Withholding	1 Qtr.			
	1948	1,304.69	July 22, 1948	1,967.35

VI.

On March 1, 1948, the decedent Murrey London filed a petition in bankruptcy No. 45752-MW in the United States District Court for the Southern District of California. On September 14, 1948, a claim for the aforementioned taxes was filed by the United

States in said bankruptcy proceeding. This claim was allowed by the Court in the amount of \$5,-759.04, which in effect constituted a final adjudication of the rights of the United States and Murrey London, decedent. There was subsequently received by the United States in partial satisfaction of this allowance the sum of \$243.29, which amount was applied by the said United States to the satisfaction of the tax liability. Other than this partial payment in the amount indicated, no part of the allowance in bankruptcy has been paid, notwithstanding proper demands therefor.

Wherefore, plaintiff demands judgment against the defendant, Jack Jay Walley, as Executor of the Estate of Murrey London, Deceased, in the amount of \$8,694.07, together with penalties [4] and interest as provided by law and for its cost herein incurred.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States Attorney,
Chief, Tax Division;

REMBERT T. BROWN,
Assistant United States Attorney;

/s/ REMBERT T. BROWN,
Attorneys for Plaintiff,
United States of America.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now the defendant, Jack Jay Walley, as Executor of the Estate of Murrey London, and answers the complaint as follows:

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

The right of action set forth in the complaint did not accrue within six years next before the commencement of this action.

Third Defense

Defendant admits the allegations contained in paragraphs I, II, III and IV of the complaint; defendant admits all of the allegations contained in paragraph V of the complaint, except that [6] defendant denies the allegation that there remains due and owing or unpaid to the United States of America on each lien the sum shown in the last column of the tax assessment set forth in said paragraph, or any sum whatsoever; defendant admits all of the allegations contained in paragraph VI of the complaint, except that defendant denies that the claim in the amount of \$5,759.03 was allowed by the court, and further denies that the allowance of the claim of plaintiff in the bankruptcy proceedings

constituted a final adjudication of the rights of the United States and Murrey London, decedent.

Fourth Defense

That the claim of the plaintiff United States for taxes, penalties and interest as alleged in said complaint, has been rendered uncollectible by reason of the fact that this proceeding was brought beyond the time permitted by the provisions of Section 1635 and Section 3312 of the Internal Revenue Code of 1939.

Wherefore, defendant prays that plaintiff recover nothing by its complaint, and that defendant have judgment as to which defendant may be entitled.

MILTON DAVIS and
LEO M. ZINNER,

By /s/ LEO M. ZINNER,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 26, 1957. [7]

[Title of District Court and Cause.]

PRETRIAL CONFERENCE ORDER

Following pretrial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court,

It Is Ordered:

I. This is an action for:

Collection of federal internal revenue taxes.

II. Federal jurisdiction is invoked upon the ground:

As provided by Section 7403 of the Internal Revenue Code of 1954.

III. The following facts are admitted and required no proof:

1. For some years prior to March 1, 1948, decedent Murrey London was engaged in business under the fictitious name London Construction Company.

2. Federal Internal Revenue taxes were assessed against Murrey London, d/b/a London Construction Company for the periods and in the amounts shown below: [9]

Type of Tax	Taxable Period	Amount Assessed	Assessment List Received
Withholding	4 Qtr. 1947	\$2,764.93	Feb. 24, 1948
Insurance	4 Qtr.		
Contributions	1947	338.70	Mar. 1, 1948
Unemployment	1947	187.19	Mar. 1, 1948
Additional			
Unemployment	1947	800.02	July 13, 1948
Insurance....	1 Qtr.		
Contributions	1948	279.29	July 23, 1948
Withholding	1 Qtr. 1948	1,304.69	July 22, 1948

3. On March 1, 1948 the decedent Murrey London filed a petition in bankruptcy No. 45752-WM in the United States District Court for the Southern District of California. The United States filed a claim in the sum of \$5,-

759.04 in said bankruptcy proceeding, representing the amount owing on the aforesaid taxes. The claim filed by the United States was allowed without any contest thereof. There was paid by the trustee in said bankruptcy proceedings, in partial satisfaction of said claim, the sum of \$243.29. No other payment has been received, and there is still unpaid to the United States of America the assessed balance of said taxes plus accrued interest thereon.

4. An order discharging said Murrey London of all debts except certain non-dischargeable debts was duly entered in said bankruptcy No. 45752-WM. [10]

5. Murrey London died on September 13, 1954. The defendant Jack Jay Walley was duly appointed executor of the decedent's estate in connection with which probate proceedings are now pending. A claim for the aforementioned taxes which was filed in said probate estate was disallowed. ✓

IV. The reservations as to the facts cited in paragraph III above are as follows:

None.

V. The following facts, though not admitted, are not to be contested at the trial by evidence to the contrary:

None.

VI. The following issues of fact, and no others, remain to be litigated upon the trial:

None.

VII. The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between the parties with respect thereto, are as follows:

None.

VIII. The following issues of law, and no others, remain to be litigated upon the trial:

1. Whether collection of the subject tax liability is barred by the statute of limitations, or

2. Whether the allowance of a claim for taxes filed in bankruptcy proceedings constitutes a judgment upon which there is no statute of limitations for collection, or

3. Whether the period for collection of the subject taxes was suspended during the pendency of the bankruptcy proceedings.

IX. The foregoing admissions having been made by the parties [11] and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

Dated: July 22, 1957.

/s/ WM. C. MATHES,

United States District Judge.

Approved as to form and content:

LAUGHLIN E. WATERS,

United States Attorney;

EDWARD R. McHALE,
Asst. United States Attorney,
Chief, Tax Division;

REMBERT T. BROWN,
Asst. United States Attorney;

/s/ REMBERT T. BROWN,
Attorneys for Plaintiff.

/s/ MILTON DAVIS,
Attorney for Defendant.

[Endorsed]: Filed July 23, 1957. [12]

[Title of District Court and Cause.]

SUPPLEMENTAL PRETRIAL CONFERENCE ORDER

Following pretrial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this court,

It Is Ordered:

I. The following further facts are admitted and require no proof:

(1) The taxes referred to in paragraph III of the original pretrial conference order are provided for in the following chapters of the Internal Revenue Code of 1939:

Insurance Contributions—Subchapter A, Chapter 9; (Federal Insurance Contributions Act).

Unemployment—Subchapter C, Chapter 9; (Federal Unemployment Tax Act).

Withholding—Subchapter D, Chapter 9; (Current Tax Payment Act).

(2) The decedent, Murrey London, died on September 13, 1954, and a petition for probate of the decedent's will was filed on [13] September 17, 1954. On October 25, 1954, defendant Jack Jay Walley was appointed as executor. The probate proceeding is designated as, In the Matter of the Estate of Murrey London, Deceased, No. 35157, Superior Court of the State of California, in and for the County of Los Angeles. On June 29, 1955, more than six years after the last assessment relative to the subject taxes was made, a claim for said taxes was filed in the probate estate and on July 8, 1955, a formal approval of this claim was filed by the executor. On November 7, 1955, the executor petitioned the Court to vacate this approval, and on November 8, 1955, the Court made an order vacating its previous order allowing the claim. On January 3, 1956, an amended claim was filed in the probate proceeding which provided that it amends and supersedes the prior claim dated June 28, 1955, and set forth the basis of the Government's claim as being the judgment resulting from the allowance of the tax claim in the bankruptcy proceedings referred to in the original pretrial con-

ference order. On January 4, 1956, a formal rejection of this amended claim was filed by the executor.

Dated: December 5th, 1957.

/s/ WM. C. MATHES,
Judge.

Approved as to Form and Content:

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Asst. United States Attorney;

REMBERT T. BROWN,
Asst. United States Attorney;

/s/ REMBERT T. BROWN,
Attorneys for Plaintiff.

/s/ JACK JAY WALLEY,
Defendant in Pro. Per.

[Endorsed]: Filed December 9, 1957. [14]

[Title of District Court and Cause.]

STIPULATION REGARDING APPLICABLE LAW

It Is Hereby Stipulated and Agreed by and between plaintiff and defendant, through their respective counsel undersigned, that the period of limitation upon assessment and collection of the employment taxes imposed by subchapters A, C, and D of

Chapter IX of the Internal Revenue Act of 1939, is contained in Section 3312 of said Act, and that said section, prior to its amendment in 1950, provided as follows:

Section 3312. Period of Limitation Upon Assessment and Collection.

Except in cases of income, estate and gift [15] taxes——

(a) General Rule. All Internal Revenue taxes shall (except as provided in subsections (b) (c) and (d) be assessed within four years after such taxes became due and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of five years after such taxes became due.

(b) False Return or No Return.

(c) Wilful Attempt to Evade Tax.

(d) Collection After Assessment. When the assessment of any tax imposed by this title has been made within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner or the taxpayer.

It Is Further Stipulated and Agreed that Section 1635 of the Internal Revenue Act of 1939, as

amended, as no application to the taxes involved in the instant case since said section was added to the Act by an amendment on August 28, 1950, and when so added provided as follows:

(g) Effective Date. The provisions of this section shall not apply to any tax imposed with respect to remuneration paid during any calendar year before 1951. [16]

In view of the foregoing, the six-year period of limitation for collection after assessment applies equally to the Federal Unemployment Tax Act, the Federal Insurance Contributions Act; and the Current Tax Payment Act of 1943 (Withholding Tax).

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Asst. United States Attorney,
Chief, Tax Division;

REMBERT T. BROWN,
Asst. United States Attorney;

By /s/ REMBERT T. BROWN,
Attorneys for Plaintiff
United States of America.

/s/ JACK JAY WALLEY,
Defendant in Pro. Per.

[Endorsed]: Filed December 4, 1957. [17]

[Title of District Court and Cause.]

ORDER FOR FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

This cause having been tried and submitted for decision, Findings of Fact, Conclusions of Law, and Judgment as prayed for in the complaint, payable in due course of the administration of the Estate of Murrey London, deceased, are ordered in favor of plaintiff and against defendant; and will be lodged with the Clerk by the attorneys for plaintiff, pursuant to local rule 7, within five days.

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause. December 17, 1957.

/s/ WM. C. MATHES,
United States District Judge.

An opinion will be filed.

[Endorsed]: Filed December 17, 1957. [18]

United States District Court for the Southern
District of California, Central Division

No. 313-57—WM—Civil

UNITED STATES OF AMERICA,
Plaintiff,
vs.

JACK JAY WALLEY, Executor of the Estate of
Murrey London,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

The above-entitled cause came on for trial on July 22, 1957, and for further trial on December 2, 1957, before the Hon. Wm. C. Mathes, Judge, sitting without a jury; plaintiff, United States of America, appearing through its counsel, Laughlin E. Waters, United States Attorney; Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and Rembert T. Brown, Assistant United States Attorney, by Rembert T. Brown, and defendant, Jack Jay Walley, Executor of the Estate of Murrey London, appearing in propria persona, and the matter having been submitted on stipulations of fact entered into by counsel and the Court having considered the same, makes the following findings of fact and conclusions of law.

Findings of Fact

I.

The plaintiff is, and at all times material hereto was, a corporation sovereign and body politic.

II.

This Court has jurisdiction of the above-entitled cause by virtue of the provisions of § 7401 and § 7403 of the Internal Revenue Code of 1954, and 28 U.S.C. §§ 1340, 1345.

III.

For some years prior to March 1, 1948, decedent Murrey London was engaged in business under the fictitious name of London Construction Company.

IV.

The Commissioner of Internal Revenue assessed against the aforesaid Murrey London, doing business as London Construction Company, federal internal revenue taxes of the type, for the taxable period, and in the amounts set forth below. The Collector of Internal Revenue for the 6th Collection District of California received the respective assessment lists showing the assessments of the aforesaid taxes on the dates shown below, on which dates liens of the United States of America arose against all property and rights to property of the taxpayer, as provided in §§ 3670 and 3671 of the 1939 Internal Revenue Code. Shortly after the receipt by the Collector of each assessment list notice of each tax assessed was given to the taxpayer and demand was made upon him for the payment of each tax so assessed, but only the amount of \$243.29 as set forth in paragraph V hereinbelow has been paid. There remains due, owing and unpaid to the United States of America on each lien the sum shown in the last column, which represents the balance of the

assessed tax plus subsequently accruing penalties and interest computed through March 8, 1957. Further interest accumulates on the total balance of assessed taxes, penalties and interest from said date at the statutory rate of six per centum per annum. In [20] addition, lien filing fees of \$5.00 have been incurred.

Type of Tax	Taxable Period	Amount Assessed	Assessment List Rec'd.	Balance Due
	4 Qtr.			
Withholding	1947	\$2,764.93	Feb. 24, 1948	\$4,264.90
Insurance	4 Qtr.			
Contributions ..	1947	338.70	Mar. 1, 1948	538.15
Unemployment	1947	187.19	Mar. 1, 1948	289.43
Additional				
Unemployment	1947	800.02	July 13, 1948	1,207.31
Insurance	1 Qtr.			
Contributions ..	1948	279.29	July 23, 1948	421.93
Withholding	1 Qtr.			
	1948	1,304.69	July 22, 1948	1,967.35

V.

On March 1, 1948, the decedent Murrey London filed a petition in bankruptcy No. 45752-WM in the United States District Court for the Southern District of California. On September 14, 1948, a claim for the aforementioned taxes was filed by the United States in said bankruptcy proceeding. This claim was allowed by the Bankruptcy Court in the amount of \$5,759.04. The allowance of this claim, after time for review or appeal had passed, constituted a final adjudication of the rights of the United States and Murrey London, decedent. There was subsequently received by the United States in partial satisfaction of this allowance the sum of \$243.29,

which amount was applied by the said United States to the satisfaction of the tax liability. Other than this partial payment in the amount indicated, no part of the allowance in bankruptcy has been paid, notwithstanding proper demands therefor. An order discharging said Murrey London of all debts except certain non-dischargeable debts was duly entered in said bankruptcy No. 45752-WM. [21]

VI.

The decedent, Murrey London, died on September 13, 1954, and a petition for probate of the decedent's will was filed on September 17, 1954. On October 25, 1954, defendant Jack Jay Walley was appointed as executor. The probate proceeding is designated as, In the Matter of the Estate of Murrey London, Deceased, No. 35157, Superior Court of the State of California, in and for the County of Los Angeles. On June 29, 1955, more than six years after the last assessment relative to the subject taxes was made, a claim for said taxes was filed in the probate estate and on July 8, 1955, a formal approval of this claim was filed by the executor. On November 7, 1955, the executor petitioned the Court to vacate this approval, and on November 8, 1955, the Court made an order vacating its previous order allowing the claim. On January 3, 1956, an amended claim was filed in the probate proceeding which provided that it amended and superseded the prior claim dated June 28, 1955, and set forth the basis of the Government's claim as being the judgment resulting from the allowance of the tax claim in the

bankruptcy proceedings referred to in paragraph V hereinabove. On January 4, 1956, a formal rejection of this amended claim was filed by the executor.

VII.

All conclusions of law which are or are deemed to be findings of fact are hereby incorporated as findings of fact.

Conclusions of Law

I.

This Court has jurisdiction of this action and the parties hereto.

II.

A proceeding in Court to collect federal internal revenue taxes can be commenced at any time within six years after said taxes have been assessed. [22]

III.

The filing of a claim for federal internal revenue taxes in a bankrupt estate is a proceeding in Court to collect said taxes within the meaning of the Internal Revenue Code.

IV.

The allowance of the claim in bankruptcy at bar constitutes in effect a final judgment in favor of the United States.

V.

There is no statute of limitations on a judgment in favor of the United States if such judgment is the result of a timely proceeding in Court to collect the taxes.

VI.

Since the claim for the subject taxes had in effect been reduced to judgment within the six-year period for the collection of said taxes as provided by statute by virtue of the allowance of the claim for said taxes in the bankrupt estate, the claim for said taxes, which was subsequently filed in the probate estate based on that allowance, was timely. A bankruptcy Court is by law a United States District Court sitting as a court in bankruptcy and as such the doctrine of *res judicata* applies not only to issues which were in fact litigated during the course of the bankruptcy proceedings, but also to issues which might have been litigated. The fact that no objections were filed to the claim filed by the United States in the bankrupt estate is of no consequence.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ordered, adjudged and decreed:

That the plaintiff, United States of America, have judgment for and shall recover from the defendant, Jack Jay Walley as Executor of the Estate of Murrey London, deceased, the sum of \$8,949.85, interest computed through December 27, 1957, and thereafter at the rate of \$.87 per day to the date of judgment, together with its costs herein incurred to be taxed by the Clerk of this [23] Court in the sum of \$22.20; all payable in due course of administration

of the Estate of Murrey London, deceased. [26
U.S.C. § 7402(a).]

December 30, 1957.

/s/ WM. C. MATHES,
United States District Judge.

Lodged December 23, 1957.

[Endorsed]: Filed and entered December 30,
1957. [24]

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

Jack Jay Walley, Executor of the Estate of Murrey London, hereby substitutes Milton Davis as attorney of record for said defendant in said defendant's place and stead.

Dated: February 10, 1958.

/s/ JACK JAY WALLEY.

Milton Davis hereby consents to act as attorney of record for the defendant, Jack Jay Walley, Executor of the Estate of Murrey London, in place and instead of said defendant.

Dated: February 10, 1958.

/s/ MILTON DAVIS.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 11, 1958. [25]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court and to the
United States of America, and to Laughlin E.
Waters, United States Attorney:

You, and Each of You, Will Please Take Notice
that the defendant, Jack J. Walley, Executor of the
Estate of Murrey London, hereby appeals to the
United States Court of Appeals for the Ninth Cir-
cuit from the judgment made and entered on the
30th day of December, 1957, in favor of the plaintiff,
United States of America, and against the de-
fendant, Jack J. Walley, Executor of the Estate
of Murrey London, and from the whole thereof.

Dated: February 10, 1958.

/s/ MILTON DAVIS,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 11, 1958. [27]

[Title of District Court and Cause.]

NOTICE TO CLERK TO PREPARE
CLERK'S TRANSCRIPT

To the Clerk of the Above-Entitled Court:

The defendant, Jack J. Walley, Executor of the
Estate of Murrey London, hereby requires that you

cause to be prepared in connection with the appeal now being taken by said defendant from the judgment entered in the above-entitled action, a transcript of the record in this action. You are requested to include in said transcript the following instruments and documents:

Complaint for Collection of Internal Revenue Tax; Answer to Complaint; Pretrial Conference Order; Supplemental Pretrial Conference Order; Stipulation re Applicable Law; Order for Preparation of Findings of Fact, etc.; Findings of Fact, Conclusions of Law, and Judgment; and Notice of Appeal, with the date of filing thereof.

Dated: February 18, 1958.

/s/ MILTON DAVIS,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 19, 1958. [29]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 30, inclusive, containing the original:

Complaint.

Answer to Complaint.

Pretrial Conference Order.

Supplemental Pretrial Conference Order.

Stipulation regarding Applicable Law.

Order for Findings of Fact, Conclusions of Law and Judgment.

Findings of Fact, Conclusions of Law and Judgment.

Substitution of Attorneys.

Notice of Appeal.

Notice to Clerk to prepare Clerk's Transcript of Record on Appeal.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60 has been paid by appellant.

Dated March 4, 1958.

[Seal]

JOHN A. CHILDRESS,
Clerk.

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15924. United States Court of Appeals for the Ninth Circuit. Jack J. Walley, Executor of the Estate of Murrey London, Deceased, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 5, 1958.

Docketed March 11, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Case No. 15924

JACK J. WALLEY, etc.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF POINTS

To the Clerk of the Above-Entitled Court:

The points on which appellant intends to rely in this court on this appeal are as follows:

1. That the facts as admitted in the pleadings and as stipulated to in the Pretrial Conference Order, do not support the following Conclusions of Law nor the judgment based thereon and made by the trial court:

IV. The allowance of the claim in bankruptcy at bar constituted in effect a final judgment in favor of the United States of America;

VI. Since the claim for the subject taxes has, in effect, been reduced to judgment within the six-year period for collection of said taxes as provided by Statute, by virtue of the allowance of the claim for said taxes in the bankrupt estate, the claim for said taxes, which was subsequently filed in the probate estate based on the allowance, was timely. A bank-

ruptcy court is by law a United States District Court sitting as a court in bankruptcy and, as such, the doctrine of *res judicata* applies not only to issues which were in fact adjudicated during the course of the bankruptcy proceedings, but also to issues which might have been litigated. The fact that no objections were filed to the claim filed by the United States in the bankrupt estate is of no consequence.

2. The mere automatic allowance of a claim for taxes filed in the taxpayer's bankruptcy proceedings, does not constitute an adjudication resulting in a personal judgment against a bankrupt taxpayer.

3. The allowance of a claim in a bankruptcy proceeding, without a contest thereon, is at best a judgment in rem adjudicating the rights of the creditor to a share in the fund held by the bankruptcy court.

4. The allowance of a claim for taxes against a bankrupt taxpayer in a bankruptcy proceeding, does not attain the dignity of a judgment in the absence of an Order or Decree of Court made after a hearing on a petition relating to allowance of the claim.

5. Even in those cases where the claim against the bankrupt taxpayer, filed in the bankruptcy proceedings, is allowed after a contest to which the bankrupt is a party, it is *res judicata* only if the claim is based upon a non-existing obligation as distinguished from a non-provable obligation.

6. Except in the case of income, profits, estate and gift taxes, or except as otherwise provided with respect to employment taxes, all Internal Revenue

taxes where the assessment has been made within the statutory period of limitation properly applied thereto, may be collected by a proceeding in court, but only if begun within six years after the assessment of the tax.

7. The general rule that a judgment is conclusive not only as to the subject matter in controversy, but also as to every other matter that was or might have been litigated, is not always applicable literally, and really means that a judgment is conclusive upon the issues tendered by the complaint.

(a) The filing of the claim being "a proceeding in court for the collection of the tax," tenders an issue which, unless adjudicated, does not fall within the rule of *res judicata*.

Dated: March 7, 1958.

/s/ MILTON DAVIS,
Attorney for Appellant.

[Endorsed]: Filed March 11, 1958.



No. 15924

**United States
Court of Appeals**
for the Ninth Circuit

JACK J. WALLEY, Executor of the Estate of
Murrey London, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Supplemental
Transcript of Record**

**Appeal from the United States District Court for the
Southern District of California
Central Division**

FILED

MAY - 2 1958

PAUL P. O'BRIEN, CLERK

No. 15924

**United States
Court of Appeals**
for the Ninth Circuit

JACK J. WALLEY, Executor of the Estate of
Murrey London, Deceased,

Appellant,

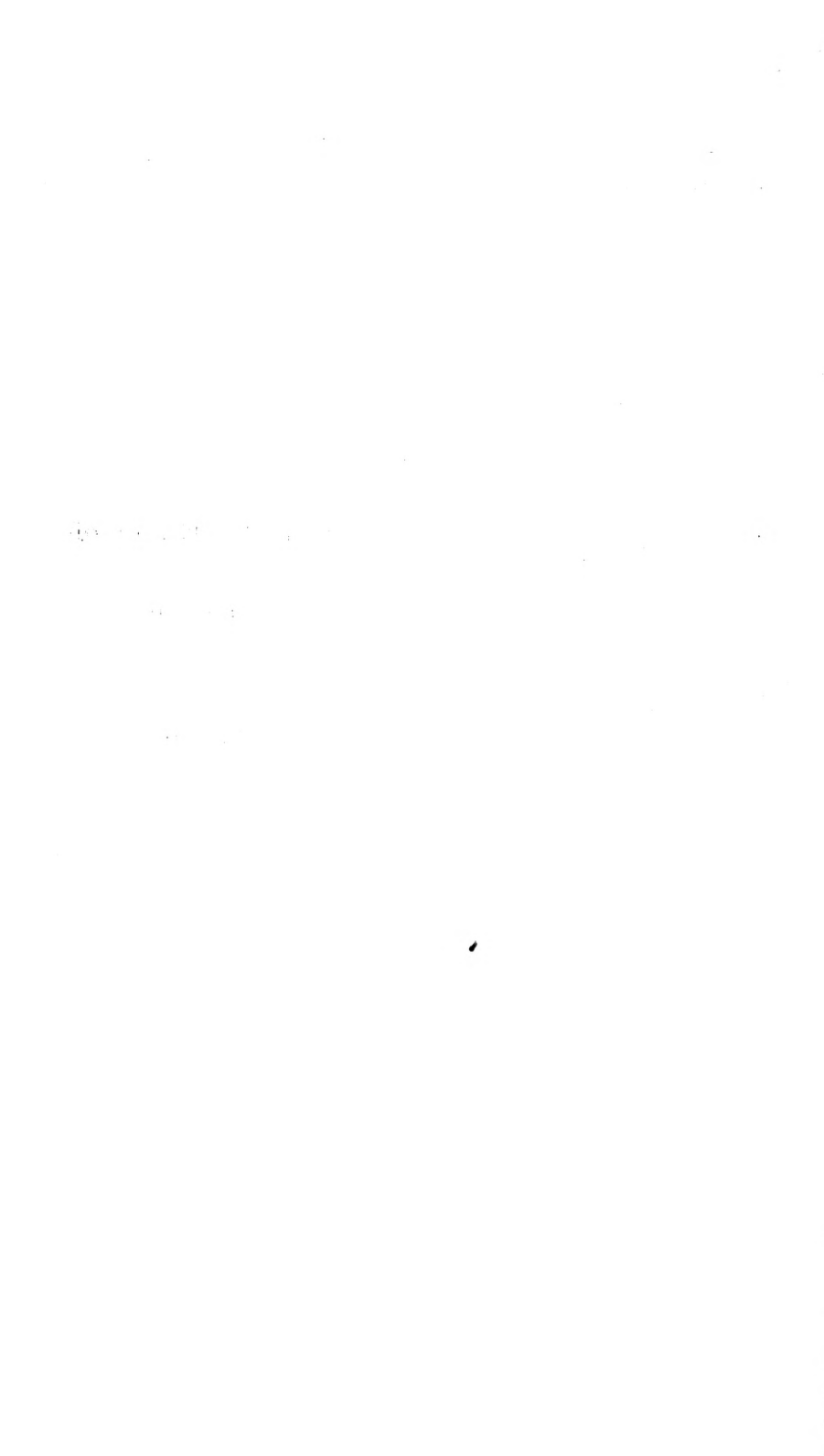
vs.

UNITED STATES OF AMERICA,

Appellee.

**Supplemental
Transcript of Record**

**Appeal from the United States District Court for the
Southern District of California
Central Division**



United States District Court for the Southern
District of California, Central Division

No. 313-57—WM—Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK JAY WALLEY, Executor of the Estate of
Murrey London,

Defendant.

MEMORANDUM OF DECISION

Appearances:

LAUGHLIN E. WATERS, ESQUIRE,
United States Attorney;

EDWARD R. McHALE, ESQUIRE,
Assistant U. S. Attorney,
Chief, Tax Division;

REMBERT T. BROWN, ESQUIRE,
Assistant U. S. Attorney,

Attorneys for Plaintiff.

JACK JAY WALLEY,
Pro Se.

Mathes, District Judge:

This action is brought to collect insurance contribution, unemployment, and withholding taxes imposed by Chapter 9, Subchapters A, C, and D, of the Internal Revenue Code of 1939 [26 U.S.C.A. (I.R.C.

1939) Chap. 9], plus accrued penalties and interest. [Int. Rev. Code of 1954 §§ 7402, 7403; 28 U.S.C. § 1340 (1952).]

The material facts are stipulated. The taxes involved were regularly and timely assessed against defendant's decedent, Murrey London, during the period between February 24 and July 23, 1948.

On March 1, 1948, London filed a voluntary petition in bankruptcy in this Court, being proceeding No. 45,752. Thereafter the United States filed a claim against the bankrupt estate for \$5,759.04, the amount alleged to be then owing on the assessments for the taxes in question. This tax claim was allowed by the Bankruptcy court without contest, and the United States has received a dividend of \$243.29 thereon. Nothing further has been paid on account of these taxes.

London died on September 13, 1954, and defendant became the duly appointed, qualified and acting executor of the London estate, which is now in probate in the State court. In due course the United States filed a claim against the decedent's estate for the unpaid balance of the tax claim as allowed by the Bankruptcy court.

The claim filed against the decedent's estate was rejected by defendant executor, and this action followed in 1957. The executor urges by way of affirmative defense that "the claim * * * for taxes, penalties and interest * * * has been rendered uncollectible by reason of the fact that this proceeding

was brought beyond the time permitted by * * * Section 3312 of the Internal Revenue Code of 1939.”

Section 3312 provides in part that the taxes in controversy here “may be collected by distraint or by a proceeding in court, but only if begun * * * [w]ithin six years after the assessment of the tax * * *” [Int. Rev. Code of 1939 § 3312(d), 53 Stat. 400 (1939).]

The tax assessments having been made in 1948, and this action not having been commenced until well more than six years thereafter, this suit is clearly barred unless the allowance of the claim in bankruptcy amounted to a judgment, now final, as to which there is no statute of limitations affecting the United States. [See *United States vs. Whited & Wheless, Ltd.*, 246 U.S. 552, 561 (1918).]

Defendant concedes that the filing of the tax claim in the bankruptcy proceedings served to initiate a “proceeding in court” within the meaning of the provisions of § 3312(d) just quoted. Also conceded, of course, is the further fact that the claim in bankruptcy was filed, and a “proceeding in court” thus begun, within the six-year period of limitation specified in § 3312(d). Defendant urges, however, that the order allowing the tax claim in bankruptcy does not rise to the dignity of a judgment for limitation purposes.

The question for decision is presented by the Government’s contention that the final order of the Bankruptcy court allowing the tax claim has the

effect of a judgment in favor of the United States to the extent that it can be enforced without limitation as to time. [See: *United States vs. Ettelson*, 159 F.2d 193, 196 (7th Cir. 1947); *Investment & Securities Co. vs. United States*, 140 F.2d 894, 896 (9th Cir. 1944); *United States vs. Havner*, 101 F.2d 161, 165 (8th Cir. 1939); cf. *In re Rury*, 21 F.2d 881 (9th Cir.), cert. denied, 276 U.S. 614 (1927).]

Insofar as the doctrine of *res judicata* is concerned, "[i]t is well settled that the action of a referee in bankruptcy allowing or disallowing a claim is a judgment, final in the absence of review * * *" [*Stearns Salt & Lumber Co. vs. Hammond*, 217 Fed. 559, 564 (6th Cir. 1914); *Lewith vs. Irving Trust Co.*, 67 F.2d 855 (2d Cir. 1933); accord, *Donald vs. Bankers Life Co.*, 107 F.2d 810 (5th Cir. 1939); *In re Tinkoff*, 85 F.2d 305, 307 (7th Cir. 1936), cert. denied, 299 U.S. 611 (1937).]

Consequently the allowance or disallowance of a claim by the Bankruptcy court is binding on the bankrupt, and anyone in privity with him as well, in a subsequent suit on the merits with the creditor. [*United States vs. Coast Wineries*, 131 F.2d, 643, 648-649 (9th Cir. 1942); *United States vs. American Surety Co.*, 56 F.2d 734, 736 (2d Cir. 1932) (*dictum*); see: *In re Henry Holzapfel's Sons, Inc.*, 249 F.2d 861, 864 (7th Cir. 1957); 5 *Remington, Bankruptcy* 482 (5th ed. 1953).]

Nor could the *res judicata* bar against relitigating the merits of the tax claim be avoided upon the

ground that the claim was allowed without contest in bankruptcy. Having failed to challenge the claim in proceedings to which he was a party and in which he could have contested it and had the merits finally determined, the bankrupt would not be permitted to question the merits of it in a subsequent suit. For it is a well-settled principle that “*res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceedings, ‘but also as respects any other available matter which might have been presented to that end.’ ” [Chicot County Drainage District vs. Baxter State Bank, 308 U.S. 371, 378 (1940); *Cromwell vs. County of Sac.*, 94 U.S. 351, 352 (1876); *Fishgold vs. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 282-283 (1946); *Lipscomb vs. United States*, 226 F.2d 812, 816-817 (8th Cir. 1955), cert. denied, 350 U.S. 971 (1956); *Daniels vs. Thomas*, 225 F.2d 795, 798 (10th Cir. 1955), cert. denied, 350 U.S. 932 (1956); see: *Angel vs. Bullington*, 330 U.S. 183, 192-193 (1947).]

It is hardly necessary to add that since defendant’s decedent would have been precluded by the doctrine of *res judicata* from relitigating the merits of the tax claim, defendant as the decedent’s personal representative is similarly precluded, an executor being “in privity” with his decedent for *res judicata* purposes.

The precise question at bar, then, is whether the rule that the allowance of a claim in bankruptcy, even though uncontested, “has all the substantial

elements of a judgment, and has the effect of a judgment * * *” [Lewith vs. Irving Trust Co., supra, 67 F.2d at 856-857] should be extended to encompass the area of limitations, at least as to non-dischargeable federal tax claims [Bankruptcy Act § 17(a)(1), 11 U.S.C. § 35(a)(1).]

That a final order allowing a tax claim ought to be so treated as a judgment is dictated by considerations beyond the negative bar of *res judicata*. Defendant’s decedent was under an affirmative duty in the bankruptcy proceedings to “examine and report to his trustee concerning the correctness of all proofs of claim filed against his estate * * *” [Bankruptcy Act § 7a(3), 11 U.S.C. § 25(a)(3).] This duty would, of course, embrace the tax claim in controversy.

Furthermore, since the tax claim was nondischargeable [Bankruptcy Act § 17a(1), 11 U.S.C. § 35(a)(1)], the bankrupt’s interest in the claim was sufficient to give him standing to object to its allowance if he disputed it, and standing as well to petition for review if he deemed the order of allowance erroneous. [Bankruptcy Act § 57d, 11 U.S.C. § 93(d); see: Bankruptcy Act § 7a(3), 11 U.S.C. § 25(a)(3); Gen. Order 21(6), 11 U.S.C. foll. § 53; *In re Povill*, 105 F.2d 157, 159 (2d Cir. 1939); *In re Woodmar Realty Co.*, 241 F.2d 768 (7th Cir. 1957); 3 Collier, Bankruptcy, 218-220 (14th ed. 1940).]

Finally, § 64a(4) of the Bankruptcy Act, in establishing a priority for tax claims, provides that “in case any question arises as to the amount or legality

of any taxes, such question shall be heard and determined by the court * * *” [11 U.S.C. § 104(a)(4).] Inasmuch as a bankrupt estate will be permitted to pay only such taxes as are “legally due and owing by the bankrupt * * *” [ibid.], the Bankruptcy court is held to have exclusive jurisdiction to determine both the amount and the legality of all taxes assessed against the bankrupt. [In re Florence Commercial Co., 19 F.2d 468 (9th Cir.), cert. denied, 275 U.S. 542 (1927); Cohen v. United States, 115 F.2d 505 (1st Cir. 1940); Hamel v. United States, 135 F. Supp. 482 (D.N.H. 1955); In re Maryland Coal Co., 36 F. Supp. 142, 145 (D.W. Va. 1941).]

A bankrupt thus has full opportunity to litigate any and all issues as to the validity of a tax claim before a court having exclusive jurisdiction of the controversy. More than this no litigant can ask.

Since, when time for review and appeal has passed, an order in bankruptcy allowing a tax claim takes on all the aspects of a judgment as to finality and estoppel [see Restatement, Judgments § 41, comment c (1942)], there is no basis in reason or policy why such a claim cannot be enforced within the time period applicable to enforcement of judgments generally in favor of the United States. [Cf. In re Rury, *supra*, 21 F. 2d 881.]

The Congress has not seen fit to provide any period of limitation for the enforcement of judgments in favor of the United States; and of course the decision whether the United States is to be limited as to the time within which to enforce a

judgment claim lies exclusively with the Congress. [See *United States v. Whited & Wheless, Ltd.*, supra, 246 U.S. at 561.]

To the extent inconsistent with the result here reached, *In re McChesney*, 58 F. 2d 340 (S.D. Cal. 1931), and *Massee & Felton Lumber Co. v. Benenson*, 23 F. 2d 107 (S.D.N.Y. 1927), relied on by defendant, must be deemed to have been overruled sub silentio. [See: *United States v. Coast Wineries*, supra, 131 F. 2d 643; *Lewith v. Irving Trust Co.*, supra, 67 F. 2d 855, and *United States v. American Surety Co.*, supra, 58 F.2d at 736 (dictum).]

Judgment as prayed for must be ordered in favor of plaintiff, to be paid in due course of administration of the estate of defendant's testator.

[Endorsed]: Filed March 25, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the Supplemental transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 11, inclusive, containing the original:

Memorandum of Decision.

Appellee's Designation of Supplemental Record.

I further certify that my fee for preparing the foregoing record, amounting to \$. . . . has been paid by appellant.

Dated: March 28, 1958.

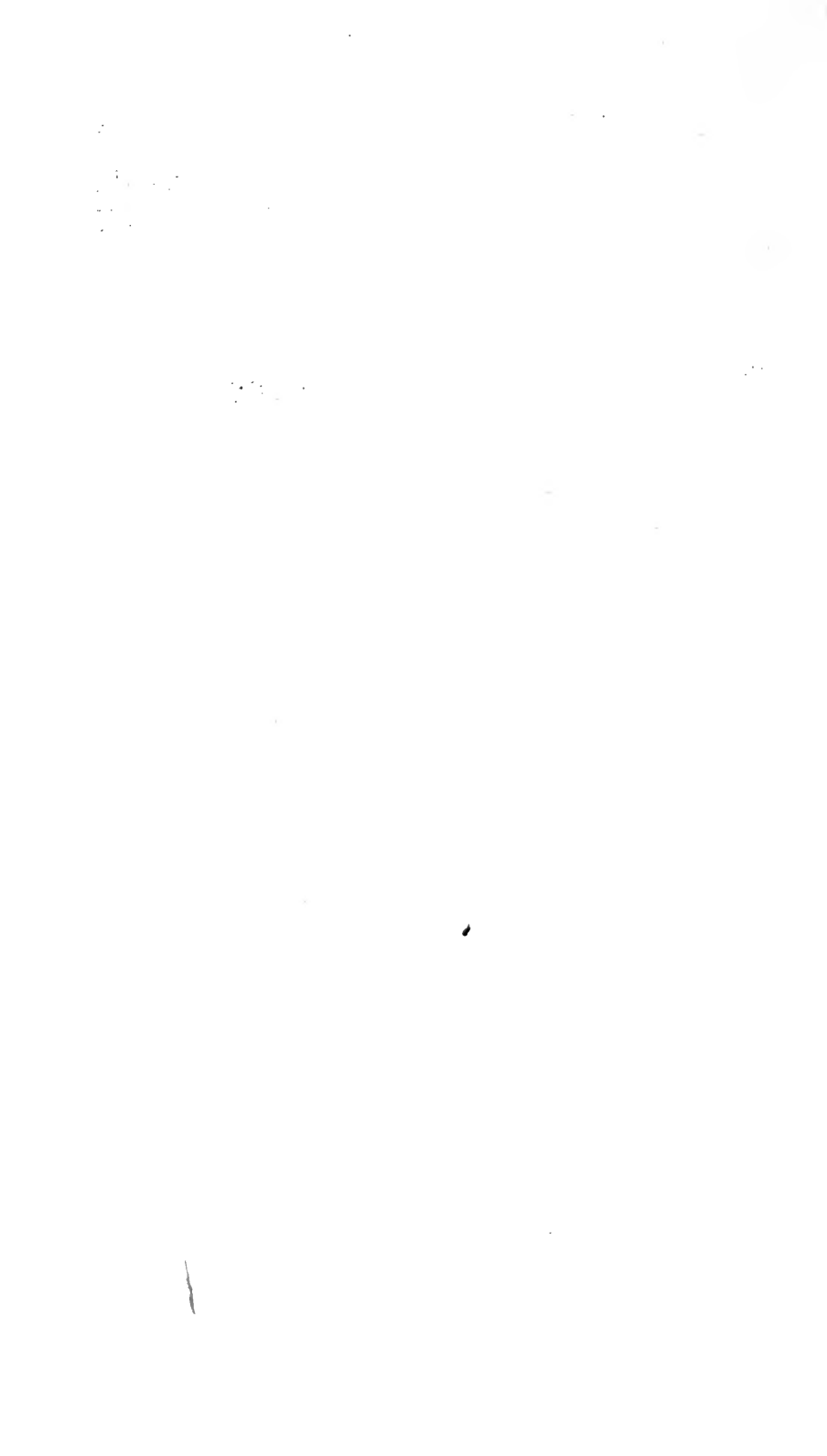
[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15924. United States Court of Appeals for the Ninth Circuit. Jack J. Walley, Executor of the Estate of Murrey London, Deceased, Appellant, vs. United States of America, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 29, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.



No. 15924

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK J. WALLEY, Executor of the Estate of Murrey
London, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

MILTON DAVIS,
408 South Spring Street,
Los Angeles 13, California,
Attorney for Appellant.

FILED

APR 28 1958

PAUL P. O'BRIEN, CL

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No. 15924

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK J. WALLEY, Executor of the Estate of Murrey
London, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement Re Jurisdiction.

The United States of America filed an action of a civil nature in the United States District Court for the Southern District of California, Central Division, against appellant, as executor of the estate of Murrey London, for the recovery of various unemployment taxes provided for in the Internal Revenue Code [Tr. pp. 3-5; Complaint]. The taxes were owing by deceased as an employing unit and were assessed within the time allowed by law. It is provided in 28 U. S. C., Section 1340, and in Sections 7401-3 of the Internal Revenue Act of 1954, that the District Court shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, and it is provided in 26 U. S. C. Sec. 3744 that these taxes may be sued for and recovered

in the name of the United States before any District Court of the United States for the district within which the liability to such tax is incurred [Tr. pp. 3-5, Complaint].

Judgment was rendered in favor of the United States for the amount of the taxes alleged to be due, and appellant, defendant in the Court below, appeals from said judgment [Tr. p. 23, Judgment]. It is provided in 28 U. S. C., Section 1291, that the United States Courts of Appeal shall have jurisdiction of appeals from all final decisions of the District Courts of the United States.

Statement of the Case.

All of the facts are stipulated to and are contained in the Pre-Trial Conference Order and Supplemental Pre-Trial Conference Order, both of which were received in evidence; the facts are substantially as follows:

Between the dates of February 24 and July 22, 1948, certain unemployment taxes due to the United States of America from Murrey London for insurance contributions, unemployment and withholding taxes, imposed by Chapter 9, Sub-Chapters A, C and D of the Internal Revenue Code of 1939 (26 U. S. C. A. Chap. 9) were duly assessed against Murrey London as an employing unit. On March 1, 1948, Murrey London filed a voluntary petition in bankruptcy in the court below, being proceeding No. 45,752. A claim for the aforementioned taxes was filed by the United States against the bankrupt's estate for \$5,759.04, the amount alleged to be then owing on the assessments for the taxes in question. The claim was allowed by the Bankruptcy Court without contest; no petition for disallowance of said claim was filed, and consequently, no hearings were had before the Referee in Bankruptcy respecting the allowance or disallowance of said claim, and

no order or decree was made by the Referee respecting such claim [Tr. p. 10, Pre-Trial Conference Order].

There was paid by the Trustee in Bankruptcy to the United States the sum of \$243.29 in partial payment of the tax claim, and the balance is still unpaid.

On September 13, 1954, Murrey London died, and Appellant was duly appointed Executor of his Estate. On June 29, 1955, more than six years after the last assessment relative to the subject taxes was made the United States filed a claim for the unpaid portion thereof in the probate proceedings pending in the State Court. The claim was rejected by Appellant, as Executor, on the ground that the claim was rendered uncollectible by reason of lapse of time, more than six years having elapsed since the making of the assessments [Tr. p. 13, Supplemental Pre-Trial Conference Order].

On March 8, 1957, this action was filed by the United States against Appellant, as Executor of said Estate, and on July 23, 1957, the matter was submitted on stipulated facts to the court below for decision. On December 17, 1957, the Honorable William C. Mathes, Judge of the District Court of the United States for the Southern District of California, Central Division, rendered his judgment in favor of plaintiff, the United States of America, for the sum of \$8,949.85, together with penalties and interest as prayed for in the complaint, and on December 30, 1957, judgment as rendered was filed and entered.

Defendant, Jack Jay Walley, as Executor of the Estate of Murrey London, being dissatisfied with said judgment, on February 11, 1958, served and filed his Notice of Appeal, and did on February 19, 1958, serve and file his Notice to the Clerk to prepare the Clerk's Transcript.

Questions Presented on Appeal.

It was agreed and stipulated between appellant and plaintiff, United States of America, that the period of limitations for the collection of the type of taxes involved herein is provided for in Section 3312 of the Internal Revenue Act of 1939, as amended, and that pursuant thereto such taxes are rendered uncollectible unless a proceeding in court for their collection shall be begun within six years of the assessment [Tr. p. 16, Stipulation].

It was conceded by the trial court that the tax assessments having been made in 1948, and the claim of the U. S. A. and this action to enforce payment thereof having been filed and commenced more than six years after the assessments, this suit is clearly barred by the Statute of Limitations unless the filing of the claim and its allowance in the bankrupt proceedings had the effect of converting the claim into a judgment against the bankrupt (District Court Memorandum of Decision).

The precise question, therefore, presented by this appeal, can be stated as follows:

Does the filing of a proof of claim for taxes, in a bankruptcy proceeding, result in the claim being converted into a personal judgment against the bankrupt by the mere fact of its formal allowance without any contest or without any objections being filed thereto and without any subsequent hearing on the merits had thereon?

Specifications of Error.

1. The trial court erred in a matter of law in concluding that the allowance of the tax claim, filed in the bankruptcy proceedings, constituted a judgment against the bankrupt, for the collection of which there is no statute of limitations, without any finding or evidence that an order of allowance was made by the Court or Referee after a hearing upon the merits [Tr. p. 22, Conclusions of Law].

2. The trial court erred in a matter of law in concluding that the filing of the tax claim in the probate proceedings was timely because reduced to judgment within six years after assessment, without any finding or evidence that an order of allowance or other judgment was rendered against the deceased taxpayer in a proceedings for the collection of the tax brought within the six-year period [Tr. p. 23, Conclusions of Law].

3. The trial court erred in a matter of law in concluding that the doctrine of "*res judicata*" was applicable to the case at bar without any finding or evidence that prior to this action a judgment had been rendered or other order made by any competent court, adjudicating the liability of the deceased for the taxes in question, after a hearing on the merits or other determination of the issue of such liability [Tr. p. 23, Conclusions of Law].

4. The trial court erred in applying the principle that "*res judicata*" may be raised as a bar to the defense of the statute of limitations under the principle that it applies to matters which were not litigated but which could have been litigated, unless the trial court found or the evidence showed that there was some proceedings, prior to the filing of the tax claim, in which the matter of the liability of the bankrupt for such taxes was in fact litigated and adjudged.

SUMMARY OF ARGUMENTS.

I.

THE FILING OF A PROOF OF CLAIM FOR TAXES, IN A BANKRUPTCY PROCEEDING, DOES NOT RESULT IN THE CLAIM RISING TO THE DIGNITY OF A JUDGMENT AGAINST THE BANKRUPT BY THE MERE FACT OF ITS FORMAL ALLOWANCE AND WITHOUT ANY ORDER OR JUDGMENT MADE BY THE COURT OR REFEREE AFTER A HEARING ON THE MERITS THEREON.

A.

A Clear Distinction Exists Between the Effect of the Filing of a Claim in Bankruptcy Which Is Automatically Allowed Upon Its Filing, and the Effect of the Filing of a Claim Which Is Allowed After an Order Made by a Referee Following a Hearing on Its Merits After Objections Filed Thereto. In the Latter Instance the Order of the Referee Has the Effect of a Judgment of the District Court.

II.

THE DOCTRINE OF "RES JUDICATA" IS APPLICABLE WHERE THE IDENTICAL ISSUE WAS DECIDED IN A PRIOR CASE BY A FINAL JUDGMENT ON THE MERITS AND THE PARTY AGAINST WHOM THE PLEA IS ASSERTED WAS A PARTY OR IN PRIVY WITH A PARTY TO THE PRIOR ADJUDICATION.

A.

The Principle That "Res Judicata" May Be Pleaded as a Bar, Not Only With Respect to Matters Actually Litigated but With Respect to Matters Which Could Have Been Litigated, Is of Course Also Applicable Only to Cases Where There Was Some Prior Litigation in Which Some Issues Were Adjudicated.

ARGUMENT.

I.

The Filing of a Proof of Claim for Taxes, in a Bankruptcy Proceeding, Does Not Result in the Claim Rising to the Dignity of a Personal Judgment Against the Bankrupt by the Mere Fact of Its Automatic Allowance and Without Any Order or Judgment Made by the Court or a Referee After a Hearing on the Merits Thereon.

- A. A Clear Distinction Exists Between the Effect of the Filing of a Claim in Bankruptcy Which Is Automatically Allowed Upon Its Filing and the Effect of the Filing of a Claim Which Is Allowed After an Order Made by a Referee Following a Hearing on the Merits After Objections Filed Thereto. In the Latter Instance the Order of the Referee Has the Effect of a Judgment of the District Court.**

In re McChesney (D. C. Cal., 1931), 59 F. 2d 340;
Goldstein v. Pearson (Mun. Ct. App., Dist. of Col., 1956), 121 A. 2d 260;

Massey & Felton Lumber Co. v. Benenson (D. C. N. Y., 1927), 23 F. 2d 107;

United States v. American Surety Co. (2nd Cir., 1932), 56 F. 2d 734;

United States v. Coast Wineries (9th Cir., 1942), 131 F. 2d 643;

Moses v. United States, 166 U. S. 507;

Wiswall v. Campbell (1896), 93 U. S. 347;

Maryman v. Dreyfuss (1915), 17 Ark. 17, 174 S. W. 549;

Lewith v. Irving Trust Co. (2nd Cir., 1933), 67 F. 2d 855;

In re Tinkoff (7th Cir., 1936), 85 F. 2d 305;

Donald v. Bankers Life Co. (5th Cir., 1939), 107 F. 2d 810.

The filing by the government of its claim in the bankruptcy proceedings was a "proceedings in court to collect" the taxes involved, but did not ripen into a judgment against the taxpayer so as to take the case out of the operation of the Statute of Limitations. The allowance of a claim for taxes, particularly where the allowance is not contested, constitutes merely "a proceeding in court to collect" the taxes, but does not result in a personal judgment against the bankrupt taxpayer. (*In re McChesney* (D. C., Cal., 1931), 59 F. 2d 340; *Goldstein v. Pearson* (Mun. Ct. App., Dist. of Col., 1956), 121 A. 2d 260.)

The filing of the claim is merely one of many "proceedings in court" which the government may commence, each one of which must be commenced within the six-year period of limitations, unless, the first of the proceedings so commenced results in a judgment being rendered against the taxpayer. (*In re McChesney, supra*; *Goldstein v. Pearson, supra*.)

A claim filed in bankruptcy proceedings is in the nature of a petition to share in a fund held by the court for distribution to creditors. (*Massey and Felton Lumber Company v. Benenson* (D. C. N. Y., 1927), 23 F. 2d 107.) The filing of the claim in bankruptcy is a proceeding *in rem*, i.e., against the assets in the hands of the court, and is not a proceedings *in persona* against the bankrupt personally. (*In re McChesney, supra*.)

The precise point involved in the instant case was decided in the case of *In re McChesney, supra*. There the Collector of Internal Revenue filed a claim for taxes in the taxpayer's bankruptcy proceedings. The claim was allowed without contest since filed within the statutory period. The bankrupt received his discharge. Six years

thereafter the taxpayer filed a second proceeding in bankruptcy. The Collector filed a claim therein for the same taxes for which a claim was filed in the first bankruptcy proceeding.

Objections were filed to the allowance of the claim and the claim disallowed after a hearing by the Referee. The order of disallowance was affirmed by the court.

The Collector took the position that the allowance of the claim in the original bankruptcy proceeding resulted in a judgment against the taxpayer which thereafter permitted its collection without regard to any Statute of Limitations. In rejecting this contention, the court held, that the filing of the claim in bankruptcy and the subsequent allowance did not result in the claim becoming a judgment *in persona* against the bankrupt.

“The filing of the claim, said the court, was a proceedings *in rem* against the assets in the hands of the court and was not a proceedings against the bankrupt personally.”

The court further stated that the filing of the claim was a “proceeding in court” just as was the filing of the claim in the first bankruptcy proceeding, and that each of such proceeding must be brought within the statutory period, and, said the court, “the filing of the claim in the second bankruptcy having been filed beyond the statutory period was properly disallowed.”

The precise point involved in this case was again raised and decided in *Goldstein v. Pearson, supra*. In that case, the taxpayer filed a proceedings in bankruptcy. The tax collector filed a claim for taxes which was allowed without contest. The bankrupt taxpayer received his discharge in bankruptcy.

After the statutory period for collection of the tax claim had run, the tax collector levied on wages of the bankrupt taxpayer, who paid the taxes under protest and brought this action for recovery.

Judgment in favor of defendant collector was reversed on appeal. The court based its reversal on the following reasoning:

“We agree that the filing of the claim was a proceeding in court, but we do not agree that it automatically extended for an unlimited time the period for collection of taxes.

“Assuming as the Collector claims, that the allowed claim in bankruptcy was in effect a judgment, it was a judgment only to the extent of the assets of the bankrupt (citing in *Re McChesney*). It was not a personal judgment against the bankrupt and no attachment or garnishment could issue upon it. The case would be quite different if within three years of the assessments the Collector had commenced an action for a personal judgment and after the three-year period had issued an attachment on the judgment.

“In our opinion, the plain meaning of the Statute is that, no distraint or ‘proceeding in court’ for collection of the taxes should be begun after three years from the date of the assessment. The filing of the proof of claim in the bankruptcy proceeding was ‘a proceeding in court,’ but it, at least for the purposes of collection of the claim, completely terminated when the bankrupt was discharged and the case closed as a no asset estate. If the taxes were to be collected, it was necessary to commence some other court proceedings or to issue a distraint within a three-year period. This was not done.”

The same question involved here was raised in *Massey and Felton v. Benenson*, *supra*, although the action did not involve a claim for taxes. In that case plaintiff filed a claim in bankruptcy proceedings filed by a corporate bankrupt, and the claim, after contest by the Trustee, was allowed for an amount less than originally filed for. Plaintiff then brought an action against the surety of the bankrupt principal contending that the allowance of the claim in bankruptcy against the bankrupt principal was equivalent to a judgment and established the indebtedness against the bankrupt principal. In that case the court said:

“The interesting legal question about the facts is whether allowance of a claim in bankruptcy is equivalent to a judgment against the bankrupt.”

In negating this contention, the court stated that a claim in bankruptcy was in no sense a claim *in persona* against the bankrupt; the Trustee in Bankruptcy represents the creditors and not the bankrupt, and could not bind him to a personal judgment; the filing of a claim and its allowance is in the nature of a petition to share in funds held by the court for distribution to creditors.

In *Wiswall v. Campbell* (1896), 93 U. S. 347, it was held that a bankruptcy court had no jurisdiction to render a personal judgment against a bankrupt on a claim filed against the estate, and in *Maryman v. Dreyfuss* (1915), 17 Ark. 17, 174 S. W. 549, the same principal was enunciated by the court on the basis of the decision in *Wiswall v. Campbell*, *supra*.

The trial court in support of its contention that the allowance of a claim in bankruptcy is a judgment, relies upon

United States v. American Surety and *United States v. Coast Wineries*. These cases are distinguishable upon the facts.

There is a long line of cases beginning with *Moses v. United States*, 166 U. S. 507, included amongst which are the two cited cases, involving actions brought by the United States against the surety of a bankrupt principal. In those cases the taxpayer principal filed a petition in bankruptcy and in the bankruptcy proceedings the United States filed its claim for taxes. In each of those cases, *objections were filed* to the allowance of the government's claim, hearings were had and orders of allowance or disallowance made by the bankruptcy court, as the facts dictated. In the subsequent actions, brought by the United States against both the bankrupt principal and the surety company, the position was taken that the order allowing or disallowing the claim, as the case may be, was admissible in evidence to establish the indebtedness from the bankrupt principal.

It should be noted at the outset that in each of these cases, the claim of the government, filed in the bankruptcy proceedings, was contested and an order of court made following the contest.

In *United States v. Coast Wineries*, 131 F. 2d 643, in determining the effect of *the order made by the bankruptcy court in the hearing on objections** to the allowance of the government's claim for taxes, the court of appeals said as follows:

“The jurisdiction of a bankruptcy court over the subject matter of taxes is specifically granted by the Bankruptcy Act, Section 64, which provides that the court shall order the Trustee to pay all taxes allegedly due and owing by the bankrupt to the United States.

“This language necessarily implies *that in controverted matters** the court might judicially determine the amount of taxes due. This procedure was followed in this case. When the court held the *hearing to determine the taxes,** the attorney for the government was present. The record shows that the claim was before the court *on its merits** and that it was disallowed.”

In *United States v. American Surety*, 56 F. 2d 734, a contrary position was taken than that taken by the court in *United States v. Coast Wineries*, and contrary to the position for which the case was cited by the trial court in the instant case. In that case it was held that the disallowance of the claim in bankruptcy *even though contested,** is not an adjudication binding upon the parties when the contested claim represents a non-provable debt as distinguished from a non-existent debt. In that case the Circuit Court said as follows:

“But the distinction must be noted between the disallowance of a claim because a creditor had a non-provable debt and disallowance because he had no debt at all. Disallowance on the former ground decides nothing as to the merits of the claim.”

It is apparent from the foregoing language and from the facts of these cases, that the allowance of a claim in bankruptcy, does not render the claim a personal judgment against the bankrupt, unless (1) the Order allowing or disallowing the claim has been made in a controverted matter, and (2) that in the controversy it appears that the contest was one involving the existence or nonexistence of the indebtedness in order that the contest be one determining the claim on its merits.

*Emphasis supplied.

The provisions of the Bankruptcy Act itself also indicates that the allowance of a claim in bankruptcy, without a contest, is not an adjudication of the existence of the claim as between the claimant and the bankrupt.

Section 57 of the Bankruptcy Act of 1939, as amended, relating to proof and allowance of creditors' claims, provides in part as follows:

“(a) A proof of claim shall consist of a statement under oath in writing . . . and shall be filed in the court of bankruptcy or before the Referee;

“(d) Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest . . . ;

“(k) Claims which have been allowed may be reconsidered for cause and allowed or rejected in whole or in part, and dividends approved upon claims which, though allowed, have been reconsidered and rejected, may be recovered by the Trustee from the creditor who received it.”

It appears from the foregoing provisions of the Act, that a claim in bankruptcy is automatically allowed upon the filing of the proof of claim with the Court or Referee, and that in the absence of a contest respecting its allowance, no order, or decree or judgment is made by the bankruptcy court which could constitute *a judgment against the bankrupt*.

One of the decisions of the Appellate Courts of the United States points up the distinction between the effect of a claim, filed in a bankruptcy proceeding, which is automatically allowed upon being filed with the Court, and the effect of a claim which is allowed by an order

of a referee after a hearing based upon objections to its allowance.

In *Lewith v. Irving Trust Co.*, *supra*, plaintiff creditor filed a claim for rental due from the bankrupt. The claim was allowed. Thereafter, the trustee filed objections to its allowance. The objections came on to be heard before the referee following which the referee made an order allowing the claim. Thereafter, the creditor sought to amend his claim from a general one to a preferred one. The referee made his order allowing the claim to be amended. The District Court reversed the order of the referee and the creditor appeals.

In affirming the order of reversal made by the District Court, the Court of Appeals points out that the Bankruptcy Act empowers the District Court to reconsider for cause claims allowed. With respect to the effect of the order of allowance, the Appellate Court says:

“So far as concerns the formal allowance of the claim by mere filing, the equities of the case may require nothing more than that the creditor wishes to amend and is not estopped. * * * But allowance *after objection** is another matter; there has been a litigation upon issues settled by the decision of the Court. Such an allowance has the substantial element of a judgment and has the effect of a judgment
* * *.”

It is obvious from the decision in the foregoing case that the mere formal allowance by the Court, based upon the mere filing of the proof of claim, does not convert the claim into a judgment or give the claim the effect of a judgment. It is the order of the referee, after a hearing

*Emphasis added.

on the merits, and in the absence of review by the Court, which raises the claim to the dignity of a judgment.

To the same effect is the decision in *Stearns Salt and Lumber Co. v. Hammond*, *supra*, in which case two claims were filed by a creditor and allowed. Objections were filed on the ground of alleged preferences. After a hearing on the issues made out by the objections, the referee made an order of allowance. It is with respect to this order that the Court of Appeals said;

“It is well settled that an action of a referee in bankruptcy in allowing or disallowing a claim is a judgment, final in the absence of review.”

The trial court, in its Memorandum of Decision, states that the rule is well settled that the action of a referee in bankruptcy allowing or disallowing a claim is a judgment, final in the absence of review, citing numerous cases. In the light of the facts of those cases, the principal might be better stated as follows; the acts of a referee allowing or disallowing a claim after a hearing on its merits, following objections filed thereto and a consideration of the issues raised thereby, is a judgment, final in the absence of review.

The distinction between the two kinds of allowances is again made apparent after a consideration of the facts in the cases of *In re Tinkoff*, *supra*, and *Donald v. Bankers Life Co.*, *supra*. In those cases matters were referred to the referee for hearings and litigation following which the referee made his order. It is with reference to these orders, made after hearing and the taking of evidence, that the Court of Appeals said;

“Under the Act (11 U. S. C. Sec. 1) a referee is a quasi-judicial officer who gives judgment or final order upon matters properly submitted to him, sub-

ject to review by the District Court * * *. *Adjudications* of the referee, if not reviewed * * * have the force and effect of judgments and orders of the District Court.”

There is not one case, relied upon by the trial court in support of its judgment, or cited by the plaintiff, United States of America, in which the Court of Appeals did not hold that it is an order of the referee, *made after a hearing on the merits*, after objections or other attack, which, in the absence of review, has the effect of a judgment or order of the District Court.

II.

The Doctrine of “Res Judicata” Is Applicable Only Where the Identical Issue Was Decided in a Prior Case by a Final Judgment on the Merits and the Party Against Whom the Plea Is Asserted Was a Party or in Privity With a Party to the Prior Adjudication.

- A. **The Principle That “Res Judicata” May Be Pleaded as a Bar Not Only With Respect to Matters Actually Litigated but With Respect to Matters Which Could Have Been Litigated, Is, of Course, Also Applicable Only to Cases Where There Was Some Prior Litigation in Which Some Issues Were Adjudicated.**

French v. Rishell (1953), 40 Cal. 2d 477, 254 P. 2d 26;

Owl Drug Co. v. Bryant (1953), 115 Cal. App. 2d 296, 252 P. 2d 69;

Tuolumne Gold Corp. v. Johnson, 61 Fed. Supp. 62;

Lewith v. Irving Trust Co., *supra*;

Stearns Salt & Lumber Co. v. Hammond (6th Cir. 1914), 217 Fed. 559;

In re Henry Holzapfel's Sons, Inc. (7th Cir. 1957), 249 F. 2d 861;

Chicot County Drainage District v. Baxter State Bank (1940), 308 U. S. 371;

Cromwell v. County of Sac (1876), 94 U. S. 351;

Fishgold v. Sullivan Drydock & Repair Corp. (1946), 328 U. S. 275.

The doctrine of "*res judicata*" is applicable where identical issues were decided in a prior case by a *final judgment on the merits* and the party against whom the plea is asserted was a party or in privity with a party prior to adjudication. (*Owl Drug Co. v. Bryant, supra.*) The same principle was enunciated by the Supreme Court of the State of California in *French v. Rishell, supra.*

The same definition of the doctrine of "*res judicata*" is contained in numerous decisions of the Federal Appellate Courts. In the matter of *In re Henry Holzapfel's Sons, Inc., supra*, the United States of America filed a claim for taxes in a bankruptcy proceeding. The trustee filed a petition for disallowance. The issues were heard by the referee who ruled against the trustee. On review, the District Court affirmed the referee's order. The trustee then filed a plenary suit to recover a refund of the taxes. The Court of Appeals held that the order of the referee, as affirmed by the District Court, was "*res judicata*" of the plenary suit; same subject matter, same parties, same issues.

In *Cromwell v. County of Sac, supra*, in considering the applicability of the doctrine of "*res judicata*", the Supreme Court said:

"The rule is that where the claim upon which the judgment was rendered is the same claim as that sued upon in the later action, *the judgment in the*

*former action, if rendered on the merits,** constitutes an absolute bar to the maintaining of a subsequent action.”

And in *Fishgold v. Sullivan Drydock & Repair Corp.*, *supra*, the Supreme Court reaffirms the rule laid down in the *Cromwell* case as being the rule in those cases where the decision in the prior case was one based upon the merits.

In order to make applicable the doctrine of “*res judicata*” to the instant case, it must appear that prior to the filing of the claim in the probate proceeding in the State Court, the validity of the claim was once litigated upon its merits and an adjudication made thereon in some prior proceedings. The only prior proceedings involving the claim for taxes was the bankruptcy proceedings of the taxpayer London in which the same tax claims were filed and allowed. However, the evidence clearly demonstrates that the validity of the tax claim was not adjudicated on the merits, no objections or petition for disallowance having been filed, and in the absence of such evidence, the doctrine of “*res judicata*” is not applicable.

In *Lewith v. Irving Trust Co.*, *supra*, it was held that where an order of allowance is made by a referee, after objection is filed thereon, there has been a litigation upon the issues which was settled by decision of the Court and that the judgment following such litigation is “*res judicata*” between the same parties.

It would appear from the cases cited and numerous others on the same point, that the mere filing of a claim for taxes does not raise any issues as to its validity. It

*Emphasis supplied.

is the filing of objections to the claim or the filing of a petition for disallowance thereof which gives rise to issues which are to be adjudicated by the referee. It is these issues which must be examined to determine whether they are the same issues sought to be adjudicated by the same parties in a subsequent proceeding, and it is the consideration of these matters that makes applicable, in a proper case, the bar of "*res judicata*".

Since there was no evidence in the instant case to support a finding that there was a hearing on the merits relating to the validity of the tax claim, the trial court took the position that since the bankrupt taxpayer could have litigated the validity of the tax claim, in fact had the duty to do so, the doctrine of "*res judicata*" could be applied as a bar to the present proceedings. The basis for the application of the doctrine, said the trial court, is the well settled principal that the doctrine applies equally

"not only as respects matters *actually presented* to sustain or defeat the right asserted *in the earlier proceedings*, but also as respects matters which might have been presented to that end." (Italics supplied.)

An examination of the language in the foregoing principle clearly demonstrates the lack of merit in the position. The language indicates that before "*res judicata*" may be raised, "as to matters which might have been presented," there must have been a hearing in which "some matters were actually presented." An adjudication of some matters in a prior proceeding is a prerequisite to the application of the principle.

Neither the right in the bankrupt to be heard nor the duty on the bankrupt's part to question the validity of the tax claim, can be substituted for the requirement of an

actual prior hearing, on the issues, of the validity of the tax claim to making applicable the principle to which the trial court made reference.

The opinion in *Chicot County Drainage District v. Baxter State Bank*, points up the necessity of a *prior hearing* before "matters which could have been litigated" can be held to be subject to the bar of "*res judicata*". In that case the Appellate Court refers to the well settled principle that "*res judicata*" may be pleaded as a bar not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, but also as respects any "available matter which might have been presented to that end," *since there had been a prior adjudication on the merits*.

In *Tuolumne Gold Corp. v. Johnson*, 61 Fed. Supp. 62, the United States District Court held that,

"under California Law a former judgment is '*res judicata*' only as to that which appears on its face to have been adjudicated or which was actually and necessarily included therein, and when it affirmatively appears that an issue *was not determined by a judgment*, such judgment is not '*res judicata*' on that issue. Citing Sec. 1911, Civil Code, State of California."

It seems obvious that the doctrine of "*res judicata*" applied by the trial court to bar the attack upon the validity of the tax claims in this action, can only be applied *if the formal allowance*, of the claim for taxes in the bankruptcy court, constituted a judgment against the bankrupt. If the latter proposition be true, then there is no need to apply the doctrine of "*res judicata*" appellant having conceded that if a judgment had been rendered in

the bankruptcy proceeding against the bankrupt, the defense of the statute of limitations would not be well taken. It would appear that the trial court applied the doctrine because there is considerable question as to whether the formal allowance, without a hearing on the merits, constituted a judgment against the bankrupt.

Conclusion.

In conclusion, appellant submits that since the evidence shows that there was no order of the referee in bankruptcy or of the District Court following a hearing on the merits of the claim for taxes filed by the United States of America, in the bankruptcy proceedings, the trial court erred in concluding that a personal judgment had been rendered in the bankruptcy proceeding against the deceased Murrey London, and therefore, the tax claim, filed in the probate proceedings was rendered uncollectible by lapse of time. Appellant respectfully urges that the judgment of the trial court be reversed with directions that judgment be rendered in favor of appellant, defendant in the court below.

Respectfully submitted,

MILTON DAVIS,

Attorney for Appellant.

**In the United States Court of Appeals
for the Ninth Circuit**

**JACK J. WALLEY, Executor of the Estate of
MURREY LONDON, Deceased, APPELLANT**

v.

UNITED STATES OF AMERICA, APPELLEE

**On Appeal from the Judgment of the United States District
Court for the Southern District of California**

BRIEF FOR APPELLEE

CHARLES K. RICE,
Assistant Attorney General.

**LEE A. JACKSON,
A. F. PRESCOTT,
JOHN J. PAJAK,**
*Attorneys,
Department of Justice,
Washington 25, D. C.*

LAUGHLIN E. WATERS,
United States Attorney.

EDWARD R. MCHALE,
Assistant United States Attorney.

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15924

**JACK J. WALLEY, Executor of the Estate of
MURREY LONDON, Deceased, APPELLANT**

v.

UNITED STATES OF AMERICA, APPELLEE

**On Appeal from the Judgment of the United States District
Court for the Southern District of California**

BRIEF FOR APPELLEE

OPINION BELOW

The opinion of the District Court (R. 33-40) is not officially reported.

JURISDICTION

These appeals involve federal withholding, insurance contribution, and unemployment taxes for the years 1947 and 1948. (R. 20.) This suit for collection was initiated on March 8, 1957, under the provisions of Section 7403 of the Internal Revenue Code of 1954. (R. 6.) The jurisdiction of the District Court

was invoked under 28 U.S.C., Sections 1340 and 1345. (R. 19.) The judgment was entered on December 30, 1957. (R. 24.) The notice of appeal was filed on February 11, 1958. (R. 25.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court correctly held that the Bankruptcy Court's final order of allowance of the tax claim has the effect of a judgment in favor of the United States to the extent that it can be enforced without limitation as to time.

STATUTES INVOLVED

The statutes involved may be found in the Appendix, *infra*.

STATEMENT

The facts were stipulated and were so found by the District Court (R. 18-23, 34) and may be summarized as follows:

The Commissioner of Internal Revenue timely assessed withholding, insurance contribution, and unemployment taxes against Murrey London (taxpayer) from February, 1948, through July, 1948. (R. 34.)

On March 1, 1948, taxpayer filed a voluntary petition in bankruptcy in the court below. The United States filed a claim in the proceeding for \$5,759.04, the amount alleged to be then owing on the taxes in question. This tax claim was allowed by the Bankruptcy Court without contest. The trustee in bankruptcy paid a dividend of \$243.29 in partial satisfaction of the allowed claim. Nothing further has been

paid on account of these taxes. An order discharging taxpayer of all debts except certain non-dischargeable debts was duly entered in the bankruptcy proceedings. (R. 20-21.)

Taxpayer died on September 13, 1954, and Jack Jay Walley was appointed as his executor. In due course the United States filed a claim against taxpayer's estate for the unpaid balance of the tax claim on June 29, 1955, more than six years after the last assessment relative to the taxes in question. On July 8, 1955, a formal approval of this claim was filed by the executor. On November 7, 1955, the executor petitioned the court to vacate this approval and on November 8, 1955, the court made an order vacating its previous order allowing the claim. An amended claim was filed in the probate proceeding on January 3, 1956, which claim provided that it amended and superseded the prior claim dated June 28, 1955, and set forth as the basis the judgment resulting from the allowance of the tax claim in the bankruptcy proceedings. A formal rejection of the amended claim was filed by the executor on January 4, 1956. (R. 21-22.)

This action against the executor followed on March 8, 1957. (R. 6.) The District Court held that the allowance of the tax claim in bankruptcy constituted in effect a final judgment in favor of the United States upon which there is no statute of limitations. (R. 22-23.) The District Court entered judgment in favor of the United States for \$8,949.85, together with interest. (R. 23-24.) The executor appealed from that judgment. (R. 25.)

SUMMARY OF ARGUMENT

A final order of allowance of the taxes in question was made in a bankruptcy proceeding commenced within the statutory limit. This action for the collection of the taxes is barred unless the final order of allowance of the tax claim in the bankruptcy proceedings amounted to a judgment in favor of the United States enforceable without limitation as to time.

The applicable case law holds that the allowance of a claim in bankruptcy is a judgment and, after the time for review has passed, is *res judicata* in a subsequent suit on the merits as to the bankrupt and one in privity with him.

That the allowance of a claim remains a judgment even though no contest was made in the bankruptcy proceeding is indicated by the continuing *res judicata* effect in such an event. *Res judicata* applies not only to matters which were raised, but also, assuming that objections had existed but had not been made, to matters which could have been raised. In this instance the burden was on the bankrupt taxpayer, whose interest was sufficient, to both object to an allowance if he had reason to dispute the claim and to petition for review before the allowance became final.

That an adjudication was made on the merits of the tax claim in question is seen from the fact that under Section 64a (4) of the Bankruptcy Act, only those taxes "legally due and owing by the bankrupt" can be ordered paid by the Bankruptcy Court. The exclusive jurisdiction to adjudicate the amount and

legality of such a tax devolves upon the Bankruptcy Court. Thus, all final allowances of a tax claim are determinations on the merits of that claim.

The reliance of taxpayer's executor upon the fact of no objection to the allowance in order to avoid its judgment effect is misplaced. If the bankrupt taxpayer agrees that a legally due claim is valid, an objection thereto would be unwarranted. Besides, the courts hold that the allowance of an uncontested claim is a final adjudication of the taxes if no timely review is taken.

The order of allowance made without objection on the merits of the tax claim became final after the time for review passed and is a judgment with *res judicata* effect. This judgment should be, and is, enforceable without limitation as to time just like any other judgment in favor of the United States.

ARGUMENT

The Final Order of Allowance of a Tax Claim In a Bankruptcy Proceeding Is a Judgment In Favor of the United States Which Can Be Collected Without Limitation As To Time

In the absence of the final order of allowance made by the Bankruptcy Court the collection of the taxes, subject of the claim filed in the probate estate, would have been barred by the statute of limitations. A proceeding in court to collect the taxes can only be commenced within six years after the assessment of the taxes. Section 3312(d) of the Internal Revenue Code of 1939 (Appendix, *infra*). More than six years has elapsed between the assessment of the taxes and taxpayer's death. However, as taxpayer's executor

concedes (Br. 8), the filing of the tax claim in the bankruptcy proceeding began a "proceeding in court" within the meaning of Section 3312(d). Since the final order of allowance of the tax claim in that bankruptcy proceeding amounted to a judgment in favor of the United States enforceable without limitation as to time, this action for the collection of taxes is not barred.

No question is raised concerning the rule that there is no statute of limitations on a judgment in favor of the United States if such judgment is the result of a timely proceeding in court to collect the taxes. *Investment & Securities Co. v. United States*, 140 F. 2d 894, 896 (C.A. 9th); *United States v. Ettelson*, 159 F. 2d 193, 196 (C.A. 7th); *United States v. Havner*, 101 F. 2d 161 (C.A. 8th). The question that is raised is whether the final order of allowance of the tax claim in the bankruptcy proceeding is equivalent to a judgment in favor of the United States so that it is enforceable without limitation as to time.

The allowance of a claim in bankruptcy has long been regarded as a judgment. *United States v. American Surety Co. of New York*, 56 F. 2d 734 (C.A. 2d); *In re John Osborn's Sons & Co.*, 177 Fed. 184 (C.A. 2d). In *United States v. American Surety Co. of New York*, 56 F. 2d 734, 736, the Second Circuit has stated as a general principle that (p. 736):

It may also be conceded that the allowance or disallowance of a claim in bankruptcy should be given like effect as *any other judgment* of a competent court, in a subsequent suit against the bankrupt or any one in privity with him. (Emphasis added.)

This Court, in *United States v. Coast Wineries*, 131 F. 2d 643, 648, quoted with approval the above statement of the Second Circuit. This Court further stated that the allowance of a claim in bankruptcy should be given the *res judicata* effect of a judgment so as not to be questioned in subsequent proceedings because (p. 648):

The judgments, decrees, and orders of the bankruptcy court in bankruptcy matters possess all the attributes of finality and estoppel accorded to judgments from courts of general original jurisdiction.

It has long been established that after the time for review has passed the action of a referee in bankruptcy allowing or disallowing a claim is a judgment with *res judicata* effect. *Sterns Salt & Lumber Co. v. Hammond*, 217 Fed. 559 (C.A. 6th); *Lewith v. Irving Trust Co.*, 67 F. 2d 855 (C.A. 2d); *Donald v. Bankers Life Co.*, 107 F. 2d 810 (C.A. 5th); *In re Tinkoff*, 85 F. 2d 305 (C.A. 7th), certiorari denied, 299 U.S. 611. As a result, in a subsequent suit on the merits, the allowance or disallowance of a claim in the bankruptcy proceeding is binding on the bankrupt and anyone in privity with him. *United States v. Coast Wineries*, 131 F. 2d 643, 648-649 (C.A. 9th); *United States v. American Surety Co. of New York*, 56 F. 2d 734, 736 (C.A. 2d); *In re Henry Holzapfel's Sons, Inc.*, 249 F. 2d 861 (C.A. 7th); 5 Remington, Bankruptcy 482 (5th ed., 1953).¹

¹ Taxpayer's executor relies on *In re McChesney*, 58 F. 2d 340 (S.D. Cal.), and *Massee & Felton Lumber Co. v. Benen-*

Taxpayer's executor attempts to avoid the judgment effect of a final allowance in bankruptcy upon the tenuous ground that taxpayer made no contest in the bankruptcy proceedings.² But, as held by the District Court below (R. 37), inasmuch as the bankrupt taxpayer failed to object to the claim in proceedings to which he was a party and in which he could have contested it, neither he, nor by privity his executor, would be permitted to question the merits in a subsequent suit. That is, assuming *arguendo*, that there might have been some basis for objection to the tax claim, the bar of *res judicata* would continue to be available to the Government for *res judicata* may be raised not only as concerns matters actually presented to sustain a right asserted in a prior proceeding but also as to any other available matter which might have been presented. *Fishgold v. Sullivan Corp.*, 328 U.S. 275, 282-283; *Chicot County Dist. v. Bank*, 308 U.S. 371, 378; *Cromwell v. County of Sac.*, 94 U.S. 351, 352.

The taxpayer was under an affirmative duty in the bankruptcy proceedings to "examine and report to his trustee concerning the correctness of all proofs of claim filed against his estate * * *" (Section 7a (3) of the Bankruptcy Act (Appendix, *infra*)), which duty would, of course, extend to the tax claim here

son, 23 F. 2d 107 (S.D. N.Y.), in Point I of his brief. These two District Court cases are properly deemed overruled *sub silentio* to the extent inconsistent with the court's holding and the Government's position. (R. 40.)

² It should be noted that no question has ever been raised as to the actual merits of the tax claim against the taxpayer. The only defense raised herein is the statute of limitations.

allowed. Taxpayer's interest in the nondischargeable tax claim (Section 17a(1) of the Bankruptcy Act (Appendix, *infra*) was sufficient to give him standing to object to its allowance if he had had reason to dispute, and, if he had deemed the order of allowance erroneous, to petition for review. (Sections 57d and k of the Bankruptcy Act (Appendix, *infra*); General Order 21(6), (11 U.S.C. 1952 ed., following Sec. 53); *In re Povill*, 105 F. 2d 157, 159 (C.A. 2d); *In re Woodmar Realty Co.*, 241 F. 2d 768 (C.A. 7th); 3 Collier, Bankruptcy, 218-220 (14th ed., 1940)).

Furthermore, the reliance of taxpayer's executor upon the fact of no objection to the allowance in order to avoid its effect as a judgment ignores the basic proposition that a bankruptcy court is permitted to order, and the bankruptcy estate to pay, only those taxes which are "legally due and owing by the bankrupt * * *". Section 64a(4) of the Bankruptcy Act (Appendix, *infra*); *In re Florence Commercial Co.*, 19 F. 2d 468, 470 (C.A. 9th), certiorari denied, *sub nom.*, *Truman v. Thalheimer*, 275 U.S. 542. The allowance of the tax claim, herein, and the payment of a portion thereof, show that there necessarily was an adjudication of the merits.³ Section 64a(4) fur-

³ The examination of the proof of claim at the least as to its conformity with the Bankruptcy Act is a "judicial act." *In re Branner*, 9 F. 2d 883, 886 (C.A. 2d). The "allowance" under Section 57d of the Bankruptcy Act does not even require a formal order if no objections were made, and such an "allowance" was considered as reduced to judgment. *New York, N. H. & H. R. Co. v. Reconstruction Fin. Corp.* 180 F. 2d 241, 246 (C.A. 2d).

ther provides that "in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court * * *". The net effect is that the Bankruptcy Court has exclusive jurisdiction to, and does, adjudicate the amount or legality of any tax assessed against the bankrupt. *In re Florence Commercial Co., supra*; *Cohen v. United States*, 115 F. 2d 505 (C.A. 1st); *Hamel v. United States*, 135 F. Supp. 482 (N.H.); *In re Maryland Coal Co. of West Virginia*, 36 F. Supp. 142 (N.D. W. Va.). Therefore, that all final allowances of a tax claim are determinations on the *merits* of the tax claim should go without saying.

Apparently taxpayer's executor grants that a final order of allowance or disallowance is a judgment final in the absence of review if objections have been filed. (Br. 16.) Yet the executor assumes that a final allowance without objection is not on the merits and claims that it therefore does not rise to the dignity of a judgment. (Br. 14.) The absurdity of this position is self-evident for he is saying that if a valid tax claim is found legally due and owing by a Bankruptcy Court and is conceded valid by a bankrupt taxpayer, the order of allowance can only become a judgment if an unwarranted objection is filed.

Additionally, the executor's comment that not one of the cases cited in the opinion or by the Government ever held that an order of a referee has the effect of a judgment without objections having been made (Br. 17), is refuted by *Cohen v. United States*, 115 F. 2d 505 (C.A. 1st). Therein, a tax claim was filed in a bankruptcy proceeding. That claim was duly allowed, no charge was ever made of fraud or mistake

as to its entry, and no review was sought. No objections were made and no hearings were held. The Government contended that where proof of claim for taxes had been allowed by the referee in bankruptcy and no petition for review was filed, the adjudication of the amount and legality of the taxes became final and the trustee's subsequent suit for refund could not be allowed. The First Circuit agreed stating (p. 507): "This was a final adjudication of the tax claim * * *." Also, in an analogous decision, *United States v. Ettelson*, 159 F. 2d 193, 196 (C.A. 7th), an uncontested tax claim was filed in probate. The Seventh Circuit held that the claim was a proceeding in court sufficient to stop the running of the statute of limitations and the judgment could be enforced at any time.

When there is no question as to the merits of the claim, as in the instant case, an allowance on the merits is made by the Bankruptcy Court without the need of controversy. When the time for reconsideration has passed,⁴ the order of allowance of the tax claim has all the substantial elements of a judgment as to finality and estoppel. There is no reason why such a final order of allowance cannot be enforced without limitation as to time like any other final judgment in favor of the United States.

⁴ It is to be noted that Section 57(k) of the Bankruptcy Act (Appendix, *infra*) specifically provides that an allowed claim may be reconsidered "*before but not after* the estate has been closed." (Emphasis added.) It is also to be noted that Section 57(k) has been misquoted by the executor (Br. 14), wherein the above quotation has been entirely eliminated.

Lewith v. Irving Trust Co., 67 F. 2d 855 (C.A. 2d), cited by the executor (Br. 15), is not in point. The question there was whether *before the estate had been closed* a claim could be heard for the second time. The Court held it could not be reconsidered.

CONCLUSION

The judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General

LEE A. JACKSON,
A. F. PRESCOTT,
JOHN J. PAJAK,
Attorneys,
Department of Justice,
Washington 25, D. C.

LAUGHLIN E. WATERS,
United States Attorney.

EDWARD R. MCHALE,
Assistant United States Attorney.

May, 1958.

APPENDIX

Internal Revenue Code of 1939:

SEC. 3312. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except in the case of income, estate, and gift taxes—

* * * *

(d) *Collection After Assessment.*—Where the assessment of any tax imposed by this title has been made within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun—

(1) Within six years after the assessment of the tax, or

(2) Prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

(26 U.S.C. 1952 ed., Sec. 3312.)

Bankruptcy Act, c. 541, 30 Stat. 544:

SEC. 7. [as amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840]. *Duties of bankrupts.*

a. The bankrupt shall * * * (3) examine and report to his trustee concerning the correctness of all proofs of claim filed against his estate; * * *

(11 U.S.C. 1952 ed., Sec. 25.)

SEC. 17. [as amended by Sec. 1, Act of June 22, 1938, *supra*] *Debts not affected by a discharge.* a. A discharge in bankruptcy shall release a bankrupt from all of his probable debts, whether allowable in full or in part, except such

as (1) are due as a tax levied by the United States, * * *

(11 U.S.C. 1952 ed., Sec. 35.)

SEC. 57. [as amended by Sec. 1, Act of June 22, 1938, *supra*] *Proof and allowance of claims.*

* * * *

d Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion: * * *

* * * *

k Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed.

* * * *

l Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part, and the trustee may also recover any excess dividend paid to any creditor. The court shall have summary jurisdiction of a proceeding by the trustee to recover any such dividends.

* * * *

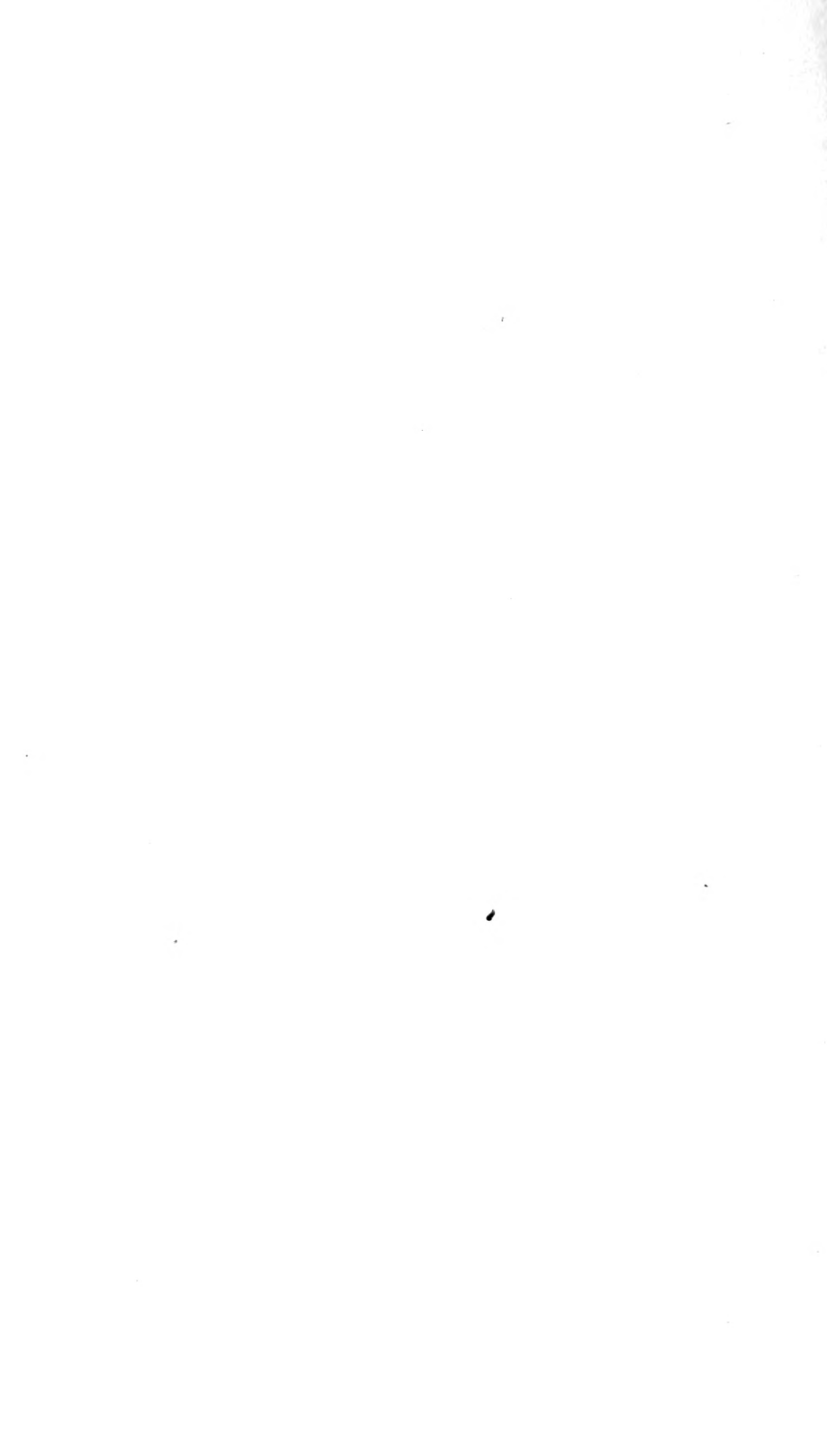
(11 U.S.C. 1952 ed., Sec. 93.)

SEC. 64. [as amended by Sec. 1, Act of June 22, 1938, *supra*]. *Debts which have priority.* a.

The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: * * * *And provided further*, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; * * *.

* * * *

(11 U.S.C. 1952 ed., Sec. 104.)



No. 15924.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK J. WALLEY, Executor of the Estate of MURREY
LONDON, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

APPELLANT'S REPLY BRIEF.

MILTON DAVIS,
408 South Spring Street,
Los Angeles 13, California,
Attorney for Appellant.

FILED

JUN 11 1958

PAUL P. O'BRIEN, CLERK

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On Appeal From the Judgment of the United States District
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APPELLANT'S REPLY BRIEF.

Preliminary Statement.

The arguments and authorities advanced and cited by appellee are, for the most part, the same arguments and authorities advanced and cited by the trial court in its opinion in support of its judgment. Those arguments were answered and the authorities analyzed by appellant in his opening brief and therefore will not again be referred to in this Reply Brief. Appellant will content himself with an analysis, of the new cases cited by appellee and the intent and purpose of the Bankruptcy Act, as evidenced by the provisions thereof and the decisions of the courts in which the provisions are interpreted and construed.

Appellant's Reply.

The Bankruptcy Act in essence provides a proceeding whereby an insolvent person, firm or corporation may be discharged from payment of its obligations by turning over to the bankruptcy court all of its assets, not exempt by law, for distribution to its creditors. The Trustee in Bankruptcy does not represent the bankrupt, who generally has his own counsel, but represents the creditors, and is under a duty to obtain for the benefit of the creditors all of the assets of the bankrupt; disclosed, concealed and conveyed away to some creditors as preferences. The position of the Trustee, obviously is, in some instances, adverse to the interests of the bankrupt. Claims filed by creditors are not filed for the purpose of litigating and reducing to judgment the bankrupt's obligations, but are filed by creditors for the purpose of sharing in the assets of the bankrupt's estate.

Section 2(a) of the Bankruptcy Act, relating to the creation of courts of bankruptcy and their jurisdiction, sets forth various things that the court is required to do in the administration of a bankrupt's estate; it provides in Subdivision (2) that the court shall allow claims, disallow claims, reconsider allowed and disallowed claims, and after reconsideration allow or disallow them *against bankrupt estates*; it provides in Subdivision (3) that the Receiver in Bankruptcy shall be authorized to prosecute or defend suits by or against a bankrupt in behalf of the estate, but only when the court is satisfied it is necessary *to preserve the estate or to prevent loss thereto*; and it provides in Subdivision (7) the court shall cause the estate to be collected, reduced to money and distributed to the creditors and in connection therewith *to determine*

controversies in relation to the collection and distribution of such estates.

Section 7(a) of the Act, respecting the duties of bankrupts, provides as follows: In Subdivision (3), that they shall examine and report to the Trustee facts concerning the correctness of all proofs of claim *filed against the estate*; and in Subdivision (7) to report to the Trustee the falsity of any claim that may have been filed *against the estate*. It is further provided in said Section that if the bankrupt is required to attend at any examination *relating to the falsity of any claim or the correctness thereof*—other than as part of the first meeting of creditors—that he shall be paid his actual and necessary travelling expenses for any distance in excess of 100 miles from his residence to the place of the hearing.

It is provided in Section 14 of the Act that the bankrupt may waive his right to a discharge from his obligations so that his creditors may eventually, after having participated in the distribution of assets, proceed to enforce the obligation owing by the bankrupt. (Secs. 2, 7 and 14, Bankruptcy Act, Appendix, *infra*.)

It would appear from these provisions of the Act that it is the primary purpose, if not the only purpose, of bankruptcy proceedings, to provide a procedure by which an officer of the court, the Trustee, representing the creditors, shall marshal all of the assets of an insolvent person for the purpose of reducing them to money and distributing them, after payment of the expenses of administration, to the creditors entitled thereto, and in determining which of the creditors are entitled thereto to engage in litigation and to require the assistance of the bankrupt for that purpose. It would appear to follow that in determining the rights of the creditors, *to share*

in the bankrupt's estate, that in any such litigation, any order, decree or judgment made by the Referee or by the Bankruptcy Court, would be an adjudication between, and binding upon, the Trustee and the particular creditor, and in no wise an adjudication binding upon the bankrupt, not a party and not represented in the litigation. The imposition of a duty upon the bankrupt, to disclose to the Trustee the incorrectness or falsity of certain claims, and payment of his travel expenses, argues more strongly against, rather than in favor of, appellee's contention that this provision of the Act is for the benefit and protection of the bankrupt and gives him standing to object to such claim. The duty is imposed upon the bankrupt for the protection of the creditors, whom the Trustee represents, since it has for its purpose the preservation of assets for those creditors lawfully entitled to share therein. If the mere filing of a claim in bankruptcy, not dischargeable under the Act, had the effect of a judgment against the bankrupt, it would not be necessary to impose a duty upon the bankrupt to disclose false or incorrect claims, his own best interests would compel such disclosure and would be sufficient protection for the creditors lawfully entitled to share.

This construction of the intent and purpose of the Congress in enacting the Bankruptcy Act is borne out by the opinions in *Goldstein v. Pierson*, *In re McChesney* and *Massee & Felton v. Bennenson*, cited in Appellant's Opening Brief. In each of those cases, the court, in negating a similar contention of the government, took the position, (1) that the filing of a claim in bankruptcy was in no sense a claim *in persona* against the bankrupt; (2) that the Trustee in Bankruptcy represented the creditors and not the bankrupt, and could not bind him to a

personal judgment; and (3) that the filing of a claim and its allowance is in the nature of a petition to share in funds held by the court for distribution to creditors.

This view is not rejected by the Court of Appeals of the Second Circuit in *New York, N. H. & H. R. Co. v. Reconstruction Fin. Corp.*, nor by the Court of Appeals of the First Circuit in *Cohen v. United States*, cited in appellee's brief and so contended by the government.

In the *New York, N. H. & H. R. Co.* case the claim involved was a "secured claim" and in determining whether the allowance of a "secured claim" has the effect of reducing the claim to a judgment, the court considered the various provisions of the Bankruptcy Act. The court points out that *no order allowing a claim is necessary* since Section 57(d) of the Bankruptcy Act provides for allowance upon presentation to the court and therefore no order of allowance is required, *at least not unless objection is made* when the claim is first received or presented to the court. The court then goes on to say at page 245:

"How far the 'allowance' so provided has the effect of a judgment is by no means wholly clear; but for the purpose of the case at bar, we will assume that unsecured claims, when 'allowed' are to be considered as reduced to judgment."

The court then goes on to point out that on the other hand, Section 57(e) provides that "secured claims" shall be only temporarily allowed until the value of the security shall be appraised. The court then reasons:

"Thus there could not be 'final allowance' of the claim in suit until the amount of the security has been appraised."

It is quite evident that the claim, made by the government in its brief, that the decision in the above case establishes the principle that *the allowance of an unsecured claim without any objection or contest reduces the claim to a judgment against the bankrupt*, is without support. The statement made by the Circuit Court was that it was not at all clear whether the allowance of an unsecured claim has the effect of a judgment and that the assumption would be made only for the purpose of argument. In addition the statement was purely obiter dictum since the claim involved in that case was a *secured claim* and the statement was not necessary to an adjudication of the issue there involved.

The claim made by the government that the First Circuit, in *Cohen v. United States*, 115 F. 2d 505, establishes the principle, that, a tax claim filed in bankruptcy has the effect of a judgment against the bankrupt, although allowed without objections or other contest of the claim, is not supported by the decision in that case. Moreover the quoted portion of the decision, contained in appellee's brief, to wit: "This was a final adjudication of the tax claim . . .", is not a correct quotation, omitting, as it does, a portion of the opinion joined by the conjunctive "and." The portion of the opinion to which the government refers provides as follows:

"This was a final adjudication of the tax claim *and was conclusive against the Trustee.*"

Cohen v. United States was an action brought by a Trustee in Bankruptcy against the United States to recover overpayment of taxes made by the Trustee in due course of administration of a bankrupt estate. It does not appear from the facts recited in the opinion whether the tax claim was filed with the clerk of the court and

allowed automatically, or whether an order of the Referee allowing the claim, was made after objections interposed by the Trustee, at the time of its filing with him. An examination of the facts in the opinion of the District Court, *32 Fed. Supp. 1*, indicates that the Order of Allowance was made by the Referee apparently after objections made to the filing of the claim. Amongst other things it is pointed out in the opinion that the Trustee failed to petition for a review of the Order of the Referee.

Of more importance than the question as to whether the allowance was a formal one following the mere fact of filing, or whether the allowance was one made after objection, is the decision of the Circuit Court that the Order of the Referee is an adjudication *binding upon and conclusive as to the Trustee*, not the bankrupt.

The First Circuit relied upon the decision *In re Universal Rubber Products Co.* (1928), 25 F. 2d 168, affirmed by the Third Circuit in 28 F. 2d 255.

In that case, the government filed a tax claim in the bankruptcy proceedings; the Trustee paid a part thereof and then petitioned the Bankruptcy Court for an order disallowing the balance; a show cause order was served upon the government and upon its failure to appear or file any petition, the Referee, on December 1, 1925, made an order disallowing the excess. About a year later the Trustee filed a petition for disallowance of a portion of the tax claim already allowed and paid and for a refund thereof. The government appeared in response to this second petition and contested the petition for refund and filed its own petition for an amendment of its claim. An order made by the Referee granting the petition of the Trustee was reversed by the District Court. It was held by the court that the facts did not

justify the granting to the Trustee of the relief which he sought under the second petition, and said the court:

“We believe that the order of December 1, 1925, was a final adjudication of this tax claim and that it is conclusive both against the Trustee in Bankruptcy who asked that it be entered, and against the collector against whom it was entered without appeal.”

It is significant that *Cohen v. United States* depends for support upon a case in which the Order of the Referee was made on a petition for disallowance, of a portion of a tax claim in a bankruptcy proceeding. However, what is more significant is the fact that in both the *Cohen* and the *Universal Rubber Products* cases, it was held by the respective courts that the orders, of allowance or disallowance, made by the Referee in each of the cases, was a final adjudication and conclusive *only as to the Trustee and the government*.

Appellant submits that these decisions are not inconsistent with the position taken by the courts in *Goldstein v. Pierson*, *In re McChesney*, and *Massee & Felton v. Bennenson*, but in fact support the decision in those cases,

“that any order of allowance of a tax claim, is at best an adjudication of the government’s rights to participate in a distribution of the assets of the estate, and does not constitute a personal judgment against the bankrupt”

and thus collectible without limitation as to time.

Of further significance is the fact that the First Circuit in *Cohen v. United States* relied in part for its decision upon *In re Anderson*, 279 Fed. 525 (1922), 2d Circuit. In that case the Trustee in Bankruptcy had the Referee issue an order to show cause against the Collector of

Internal Revenue to require him to appear and file his claim for taxes, due from the bankrupt, in the bankrupt's estate so that the Trustee could object and have a hearing thereon. The Collector appeared in response to the order to show cause but refused to file a claim, following which the Referee made an order barring the government *from participation in the estate* for any taxes for the year involved. This order was affirmed on appeal.

In its opinion the court states that the United States must file its claim for taxes, as any other creditor, *if it desires to share in the estate*, and that the court must determine any question, as to amount or legality of the tax, which might be raised by the Trustee. It is pointed out by the court that Section 64 of the Bankruptcy Act relating to debts which have priority, provides a procedure whereby the Bankruptcy Court may determine and adjudicate the amount and legality of a tax claim of the United States respecting its right *to share in the assets of the estate in preference to other creditors* and that any such adjudication *is binding upon the government and the Trustee*. The Trustee being charged with the duty of ascertaining and paying claims due the United States, whether filed or not, must have a speedy method for ascertaining the amount due the government as a prior claim in order that the Trustee discharge his responsibility.

Appellant does not contend, as the government would have the court believe, that a valid tax claim found to be legally due and owing by a bankruptcy court and conceded valid by a bankrupt taxpayer, can only become a judgment if an unwarranted objection is filed thereto pursuant to which an order is made. (Br. p. 10.) To so argue would indeed be absurd.

Appellant does contend that the mere filing of a tax claim, by the government, does not make it a valid tax claim; nor is it, by reason of its mere filing, found to be legally due and owing by the bankruptcy court, and conceded to be valid by the bankrupt taxpayer. Appellant contends that it is the Order of Allowance made by the court or Referee, after a hearing on objections or a petition for disallowance, that renders the tax claim valid and that results in an adjudication by the bankruptcy court that the tax claim is legally due and owing.

Nor can it be said that an objection or petition for disallowance, to the filing of the tax claim, is unwarranted, until such time as the court or Referee adjudicates it to be such, after the issue has been raised by the objection or the petition for disallowance filed thereto. If this contention on the part of appellant be absurd, then so are the decisions of the District Courts in the cases of *In re McChesney*, *Goldstein v. Pierson*, and *Massee & Felton v. Bennenson*, since the contentions made by appellant are not original but merely set forth the reasoning and decisions made by the courts in those cases.

So also would be the decision of the Circuit Court in *Lewith v. Irving Trust Co.*, since in that case it was also held by the court:

“ . . . But allowance after objection . . . is another matter; there has been a litigation upon issues settled by the decision of the Court. Such an allowance has the substantial element of a judgment and has the effect of a judgment . . . ”

Respectfully submitted,

MILTON DAVIS,

Attorney for Appellant.

APPENDIX.

BANKRUPTCY ACT OF JUNE 22, 1938:

Sec. 2: Creation of Courts of Bankruptcy and their Jurisdiction.

(a)(2): Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them *against bankrupt estates*;

(3) Appoint, upon the application of parties in interest, receivers or the marshals to take charge of the property of bankrupts *and to protect the interests of creditors* after the filing of the petition and until it is dismissed or the trustee is qualified; and to authorize such receiver, upon his application, to prosecute or defend any pending suit or proceeding by or against a bankrupt or to commence and prosecute any suit or proceeding in behalf of the estate before any judicial, legislative, or administrative tribunal in any jurisdiction, until the petition is dismissed or the trustee is qualified: *Provided, however,* That the court shall be satisfied that such appointment or authorization *is necessary to preserve the estate or to prevent loss thereto*;

(7) Cause the estate of bankrupts to be collected, reduced to money and distributed, *and determine controversies in relation thereto*, . . .

Sec. 7. Duties of Bankrupts.

a. . . . (3) examine and report to his trustee concerning the correctness of all proofs of claim *filed against his estate*; (7) in case of any person having to his knowledge proved a false claim *against his estate*, disclose that fact immediately to his trustee; (10) . . . : *Provided, however,* that when the bankrupt is required to attend for

examination, except at the first meeting and at the hearing upon objections, if any, to his discharge, he shall be paid actual and necessary travelling expenses for any distance in excess of one hundred miles from his place of residence at the time of bankruptcy: . . .

Sec. 14: Discharges, When Granted:

a. The adjudication of any person, except a corporation, shall operate as an application for a discharge: *Provided*, That the bankrupt may, before the hearing on such application, waive by writing, filed with the court, his right to a discharge. (*Italics supplied throughout.*)

No. 15,927 ✓

IN THE
United States Court of Appeals
For the Ninth Circuit

JIMMIE LEE FLORES,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the
District of Hawaii in Criminal No. 11,111.

APPELLEE'S ANSWERING BRIEF.

LOUIS B. BLISSARD,

United States Attorney,
District of Hawaii,

CHARLES B. DWIGHT III,

Assistant United States Attorney,
District of Hawaii,
Federal Building, Honolulu, Hawaii,

Attorneys for Appellee.

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PAUL P. O'BRIEN, CLERK

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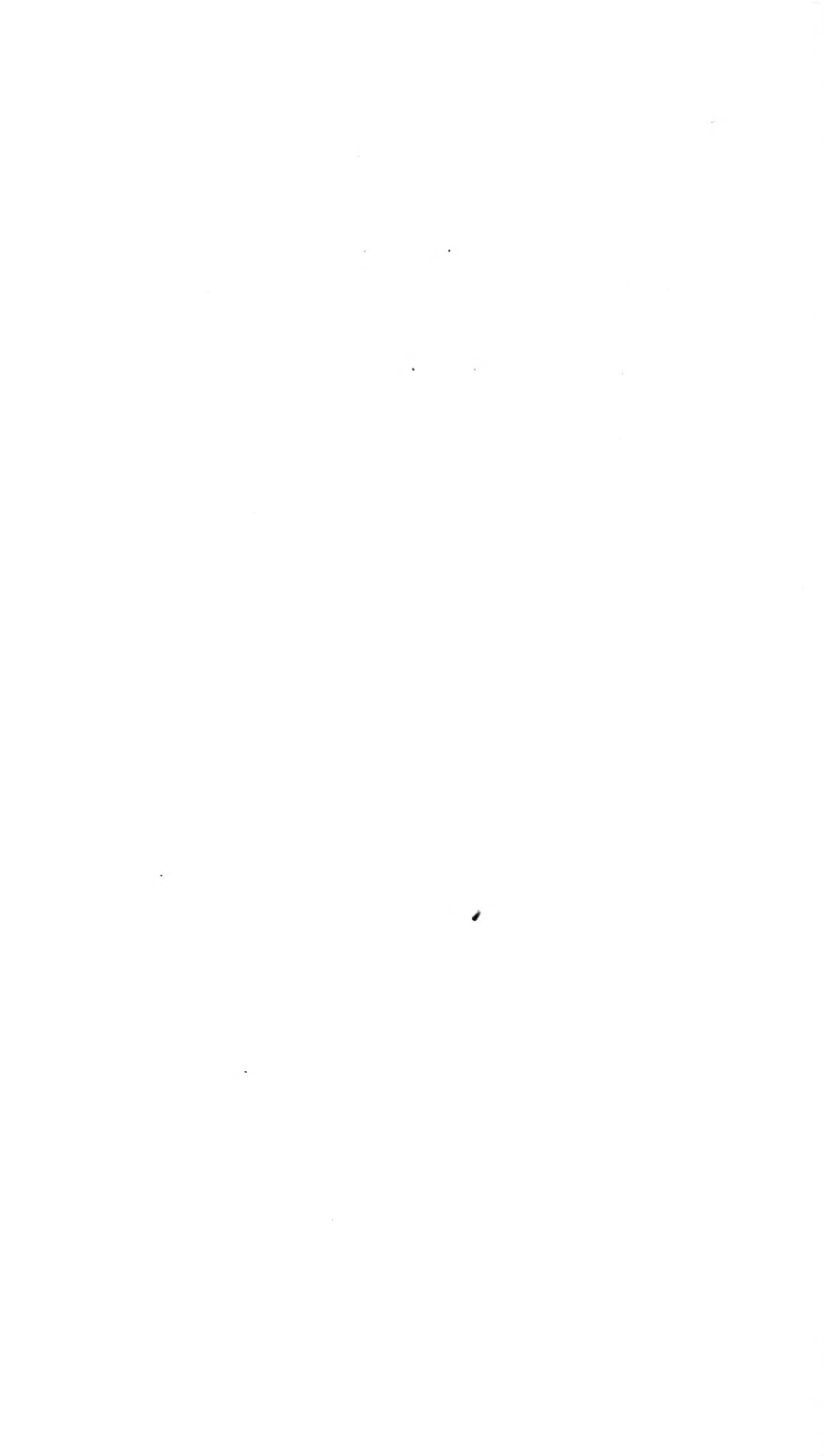
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District of Hawaii in Criminal No. 11,111.**

APPELLEE'S ANSWERING BRIEF.

JURISDICTIONAL STATEMENT.

Appellee agrees with the jurisdictional statement contained in Appellant's Opening Brief.

STATEMENT OF FACTS.

Since the Appellant contends that the verdict was contrary to the weight of the evidence, the following facts are pertinent:

Castro testified he gave Appellant his address where he would receive mail in Puerto Rico (TR 29) and

then from Puerto Rico sent a letter to Appellant giving his new address (TR 30-32), but Castro never heard from Appellant, never received the \$3,000 or an offer to pay such amount (TR 34). Appellant, having been entrusted with the endorsed checks (TR 28), deposited them in an account in his and his wife's name (TR 111) and later commingled the funds with his own (TR 123, 137-8). Still later he used these funds for his own purposes (TR 139-141).

STATUTES INVOLVED.

Section 11360, Revised Laws of Hawaii 1945, now Section 289-1, Revised Laws of Hawaii 1955.

Chapter 263. GROSS CHEAT.

Section 11360. Defined. Whoever shall designedly, by any false pretense and with intent to defraud, obtain from another any money, goods, or other thing of value, is guilty of a gross cheat; for example, the obtaining of money or other property from another under false pretense of being sent for the same by a friend or acquaintance of his; or obtaining money by means of a letter fabricated in the name of another. [P.C. 1869, c. 21, s. 1.]

Section 11440, Revised Laws of Hawaii 1945, now Section 293-21, Revised Laws of Hawaii 1955.

Section 11440. False pretenses; punishable as larceny. Every person who knowingly and designedly, by any false or fraudulent representation, statement or pretense obtains from any other

person, money, labor, services or property, whether real or personal, or who knowingly and designedly by any false or fraudulent representation, statement or pretense, together with a promise or undertaking of future performance, obtains from any other person money, labor, services or property, whether real or personal, or who knowingly and designedly causes or procures another to report falsely of his wealth, mercantile character or credit standing, and thus obtains credit or obtains the labor or services of another, is punishable in the same manner and to the same extent as for larceny of the money or property or of property of the value of the labor or services so obtained. [L. 1949, c. 78, s. 1.]

Section 11366, Revised Laws of Hawaii 1945, now Section 289-7, Revised Laws of Hawaii 1955.

Section 11366. Gross cheat where facts show larceny. If upon the trial of any person indicted for obtaining property by false pretenses, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts. [L. 1876, c. 40, s. 55.]

Section 532, Penal Code of California 1949.

Section 532. [Obtaining money, property or labor by false pretenses: Procuring false credit report: Punishment.] Every person who knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of money, labor, or property, whether real

or personal, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets possession of money or property, or obtains the labor or service of another, is punishable in the same manner and to the same extent as for larceny of the money or property so obtained. [Enacted 1872; Am. Stats. 1889, p. 14; Stats. 1901, p. 466 (unconstitutional); Stats. 1905, p. 685.]

Section 484, Penal Code of California 1949.

Section 484. [Theft defined: Stealing or misappropriation of property: Obtaining money, labor, property or credit by fraud or false report: Determination of value of property or services: Representation or pretense deemed continuing: Charging date of offense: Hiring employee without advising of unpaid labor claim or judgment.] Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services

received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false and fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud. [Enacted 1872; Am. Stats. 1927, p. 1046; Stats. 1935, p. 2194.]

(According to California authorities Section 532 was repealed by implication by amendment of Section 484; *People v. Carter*, 131 C.A. 177, 182, 21 P.2d 129; *People v. Jackson*, 24 C.A. 2d 182, 74 P.2d 1085.)

Idaho Code, 18-101 to 20-627, Crimes—Criminal Procedure—Prisons.

18-3101. Obtaining money, property or labor under false pretenses. Every person who knowingly and designedly by any false or fraudulent representation or pretense, defrauds any other person of money, labor or property, whether real or personal, or obtains the signature of another to any instrument in writing whereby any liability is created, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit and thereby fraudulently gets posses-

sion of money or property, or obtains the labor or service of another, is punishable in the same manner and to the same extent as for larceny of the money or the value of the property so obtained; and the reasonable value of any labor or services and the amount of the liability created by any written instrument shall be taken as the value of such labor or services or of such written instrument. (Cr. & P. 1865, §§ 136, 137; R.S. & R.C., § 7096; am. 1909, p. 20 H.B. 112; reen. C.L. § 7096; C.S., § 8474; I.C.A., § 17-3902).

QUESTIONS PRESENTED.

Appellee has no argument with Appellant's authorities or the principles of law contained therein, but only with Appellant's conception of the Hawaii statutes in question.

Four questions present themselves in discussing the Appellant's first contention:

1. Did Sec. 11,440, Revised Laws of Hawaii, 1945, (now Sec. 293-21, Revised Laws of Hawaii, 1955) create a new crime which was not intended by the Legislature to have engrafted upon it interpretations of different laws from other states?
2. Was California law adopted and used by the Territorial Legislature in drafting this statute?
3. Does Sec. 11,366 do away with the distinction made in the California cases?

4. Regardless of the answers to the above questions, did not Castro deliver possession and title to the checks to Appellant?

ARGUMENT.

I. THE EVIDENCE BROUGHT OUT AT TRIAL PROVED THE OFFENSE WITH WHICH APPELLANT WAS CHARGED.

1. A careful comparison of Sections 11,360 and 11,440, Revised Laws of Hawaii, 1945, shows that the two sections cover entirely different things. Sec. 11,360 covers the traditional crimes of obtaining money or property under false pretenses and, as such, the effect of the statute was limited by the Supreme Court of the Territory in *Taok v. Territory*, 33 Hawaii 560 (1935). In this case the Supreme Court of Hawaii noted that Sec. 11,360 is modeled after the English statute, 30 GEO. II c.24, § 1, which is the model for many state false pretense statutes (called, in Hawaii, "gross cheat"). The Supreme Court held that, therefore this section should be read in conjunction with the limitations and interpretations placed on false pretense statutes by both English and state courts. At page 564 the Court stated that in a crime under the false pretense statutes, the false pretense or representation would have to be concerning an existing fact or a past event.

With this background, the legislative history of Sec. 11,440, Revised Laws of Hawaii, 1945 (now Sec. 293-21, Revised Laws of Hawaii, 1955), is invited to the Court's attention (see Appendix). It becomes

quite obvious that the Committee on Judiciary of the Territory of Hawaii House of Representatives was at first concerned with amending Sec. 11,360. However, this plan was dropped. As stated in the report of the Committee, "In the redraft which Mr. Cades submitted, together with an accompanying memorandum, it was suggested that, instead of amending Sec. 11,360 of Chapter 263 relative to Gross Cheat, Chapter 267 relative to Larceny be amended to take care of offenses relative to swindling and fleecing." It is obvious in the reading of the Report of the Committee on Judiciary that the Committee was well aware that it was making new statutory crimes to take care of the situation which then existed and that it was not dealing with such frozen concepts as larceny by trick and obtaining money by false pretense. Consequently, it is contended by the Appellee that the Legislature itself intended to and did set up a new statutory crime which went further than and took into consideration the limitations of the crime of false pretenses or "gross cheat" as denominated by Hawaiian statute and, further, that this new crime was put under the larceny chapter rather than under the "gross cheat chapter" as a further indication that the Legislature considered this new crime to be closer to and akin to larceny rather than to gross cheat or false pretenses. For a situation where similar principles were applied, see *Morrisette v. U. S.*, 342 U.S. 246 at 263-273.

Though *Taok v. Territory*, *supra*, makes it clear that Sec. 11,360 is the "false pretense statute" in the Territory, there is no denying that the language in Sec. 11,440 is quite similar in parts to Sec. 11,360. How-

ever, it is quite clear from the legislative history of Sec. 11,440 that the Legislature was attempting, and we think it has succeeded in defining a new and different statutory crime which is broader and covers more than Sec. 11,360, the false pretense statute; and it is clear from an examination of the statute and indictment that the words of the indictment cover the situation shown by the evidence. Consequently, Appellee contends that Sec. 11,440, Revised Laws of Hawaii, 1945, encompasses a new statutory crime which includes, but is not limited to, such common-law concepts as larceny by trick and false pretenses.

2. Appellant states in his Brief that California law was used as a model for this section (Br. 12). There is no authority for this statement. Legislative history does not reveal this, nor is the section itself "practically verbatim", as alleged by the Appellant. A statute which is closer, for example, is to be found in the Idaho Code, Vol. IV, Sec. 18-3101. Appellee contends that there is nothing in the record or in the legislative history of the Hawaii statute which in any way intimates that it was borrowed practically verbatim, or otherwise, from California statutes. The construction placed upon its statutes by the Courts of California have, therefore, no relevance here.

3. However, let us assume that everything Appellant says is correct, i.e.

- a. That Sec. 11,440 is a false pretense statute.
- b. That Appellant was charged with false pretenses and that instead of false pretenses being proved, larceny by trick, scheme and device was proved, and

c. That the California statutes and the interpretation engrafted thereupon would be relevant and applicable here, if "in harmony with justice and public policy and with other laws of the adopting jurisdiction on the subject." (Quotation from Appellant's Brief, page 11.)

Even this avails Appellant naught for in Hawaii Sec. 11,366 Revised Laws of Hawaii, 1945 (presently Sec. 289-7, Revised Laws of Hawaii, 1955) would be for application. Originally enacted in 1876, prior to any California legislation on the subject, the section provides:

"If upon the trial of any person indicted for obtaining property by false pretenses it is proved he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, . . ."

So, even assuming the above facts, it is obvious that there is a very definite difference between California's and Hawaii's method of treating a variance of proof between false pretenses and larceny—in Hawaii there is no real variance and the accused is convicted regardless.

4. When Castro endorsed and delivered the checks to Appellant he parted with title as well as possession. He was told and believed that the checks would be put through some Army process which would take a year and a day. The jury could draw the very reasonable inference that Castro had no expectation of getting the checks themselves back at the end of this period,

but rather, that he expected to get back \$3,000. Thus, even under the California interpretations cited by Appellant, we have here a classical concept of "false pretenses".

**II. THE EVIDENCE WAS AMPLE TO SUPPORT
THE VERDICT OF THE JURY.**

Appellant's real complaint is in essence that the jury believed Castro and not him. The jury could believe and was justified in believing Castro and disbelieving Appellant. The latter's own testimony of his acts subsequent to the acquisition of the checks was such that the jury could believe that he obtained the checks from Castro by false and fraudulent representations, statements and pretenses, and that his story about the circumstances surrounding the acquisition was false.

Appellant admits that the testimony of Castro on direct examination was sufficient to substantiate the verdict of the jury (Br. 17). There was much more but that is all that was necessary. His argument is one to be addressed to a jury—not to an Appellate Court after verdict.

Appellee believes the above principles are so self-evident as to require no citations of authority.

CONCLUSION.

The conviction in the Court below should be sustained.

Dated, Honolulu, T. H.,

May 12, 1958.

LOUIS B. BLISSARD,

United States Attorney,

District of Hawaii,

CHARLES B. DWIGHT III,

Assistant United States Attorney,

District of Hawaii,

Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE 25TH
LEGISLATURE, TERRITORY OF HAWAII, REGULAR SESSION
PAGES 735-736.

Mr. Marcallino, for the Committee on Judiciary, presented a report (Stand. Com. Rep. No. 189), recommending that House Bill No. 54, entitled: "An Act to amend Section 11360 of the Revised Laws of Hawaii 1945, relating to the crime of gross cheat," be placed on file, and introducing a bill in place thereof (H.B. No. 916), entitled: "An Act to amend Chapter 267 of the Revised Laws of Hawaii 1945, relating to larceny, by adding a new section to be numbered Section 11440, providing that the obtaining of money, property, labor or services by false pretenses shall be punishable in the same manner as larceny."

The report of the committee was read by the Clerk, as follows:

"Honolulu, T.H.
March 25, 1949

Honorable Hiram L. Fong, Speaker
House of Representatives
Honolulu, T.H.

Sir:

Your Committee on Judiciary, to which was referred House Bill No. 54, introduced by Representatives C. E. Kauhane, Earl A. Nielsen, Akoni Pule, Clarence K. Seong, James K. Trask, and Steere Noda, entitled: 'An Act to amend section 11360 of the Revised Laws of Hawaii, 1945, relating to the crime of gross cheat,' has had the same

under careful consideration and begs leave to report as follows:

The intended purpose of this Bill was to redefine the offenses of gross cheat to adequately take care of the typical swindling and fleecing cases so prevalent in the Territory today.

In considering this Bill your Committee heard the views of Attorney M. Watanabe, Deputy Attorney General; John R. Desha, Assistant Public Prosecutor of the City and County of Honolulu; Attorney J. Russell Cades, Chairman of the Legislative Committee of the Bar Association of Hawaii; and Attorney Jerome Hughes, Chairman of the Committee on Crimes and Criminal Procedure of the Bar Association.

As a result of the expressions of views to the effect that House Bill No. 54 as drafted did not adequately remedy the situation presented in the case of *Territory v. Taok*, 33 Hawaii 560 (1935), your Committee requested Attorney J. R. Cades to submit a redraft of the Bill. In the redraft which Mr. Cades submitted, together with an accompanying memorandum, it was suggested that, instead of amending Section 11360 of Chapter 263 relative to Gross Cheat, Chapter 267 relative to Larceny be amended to take care of offenses relative to swindling and fleecing.

Your Committee is in accord with the views of Attorney Cades that the present gross cheat statute should be left as is, inasmuch as the repeal thereof would affect existing indictments and would require a great number of changes in the statutes in which the crime of gross cheat is referred to, and that such a repeal can best be

accomplished when there is a major overhaul of the Criminal Code.

Your Committee feels that the bill in the redrafted form as proposed by Attorney Cades will meet the needs and the purposes for which the original bill was intended, and that the redrafted bill will permit indictments where a false representation of an existing fact or present event is coupled with an undertaking or promise of future performance, and believes that this redrafted bill will be effective in taking care of the typical swindling and fleecing cases.

This redrafted bill meets with the approval of the Legislative Committee of the Bar Association of the Territory of Hawaii and with the Drafting Committee of Lawyers for the Business Committee for Progressive Legislation.

Your Committee recommends that House Bill No. 54 be placed on file and introduces as its bill the redrafted bill, which is attached hereto, with the recommendation that it do pass. However, your Committee would like to give credit to the original introducers of House Bill No. 54 inasmuch as the bill to be introduced by your Committee is an outgrowth of the discussions relative to House Bill No. 54.

Respectfully submitted,

A. Q. Marcallino,

Chairman

Robert L. Hind, Jr.,

Vice-Chairman

E. P. Lydgate

Jack P. King.

Steere G. Noda

Earl A. Nielsen."

On motion by Mr. Marcallino, seconded by Mr. Kauhane and unanimously carried, Standing Committee Report No. 189 was adopted, House Bill No. 54 was placed on file, and House Bill No. 916 passed First Reading by title and was referred to the Committee on Revision and Printing.

SENATE JOURNAL, 25TH LEGISLATURE OF THE TERRITORY
OF HAWAII, REGULAR SESSION 1949, PAGE 986.

Senator Hill, for the Committee on Judiciary, presented a report (Stand. Com. Rep. No. 276), recommending the passage of House Bill No. 916, which was read by the Clerk as follows:

“Honolulu, T.H., April 18, 1949

Honorable Wilfred C. Tsukiyama
President of the Senate.

Sir:

Your committee on Judiciary, to which was referred House Bill No. 916, entitled: ‘An Act to Amend Chapter 267 of the Revised Laws of Hawaii, 1945, Relating to Larceny, by Adding a New Section to be Numbered Section 11440, Providing That the Obtaining of Money, Property, Labor or Services by False Pretenses Shall Be Punishable in the Same Manner as Larceny’, begs leave to report as follows:

The purpose of this bill is briefly stated in the title. It is primarily intended to reach the confidence games under which so many local people have lost their life savings in the recent past.

Your Committee is in favor of the bill and recommends that it do pass.

Respectfully submitted,
Wm. H. Hill, Chairman
Ben Dillingham
M. R. Aguiar, Jr.
Neal S. Blaisdell
Wm. H. Heen''

Upon motion by Senator Blaisdell, seconded by Senator Duarte, the report of the Committee was adopted. House Bill No. 916 passed Second Reading and was placed on the calendar for Third Reading tomorrow.



No. 15928✓

**United States
Court of Appeals**
For the Ninth Circuit

JAMES D. BOBBROFF,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court
for the District of Nevada**

FILED

APR - 9 1958

No. 15928

**United States
Court of Appeals**
For the Ninth Circuit

JAMES D. BOBBROFF,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

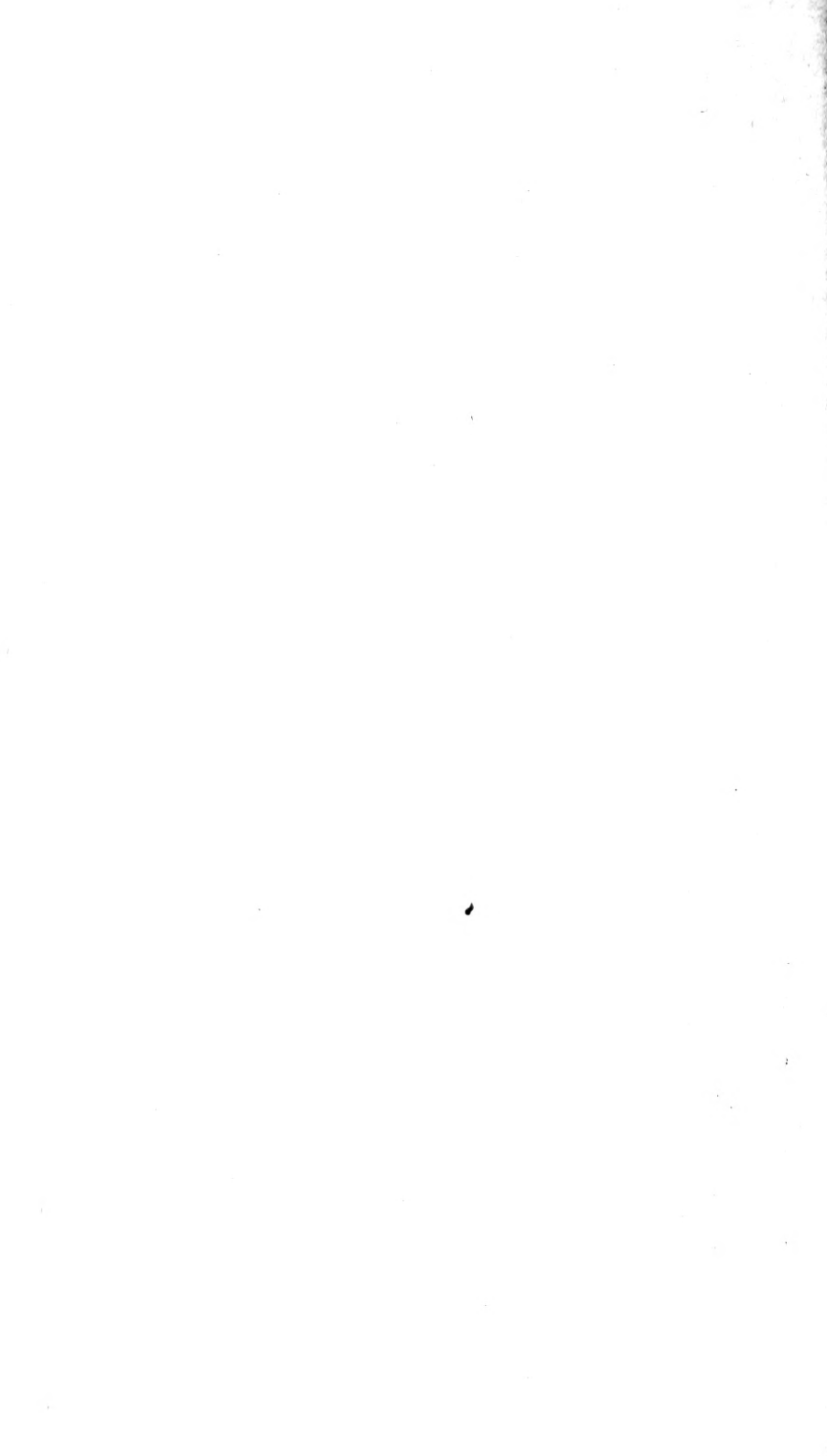
**Appeal from the United States District Court
for the District of Nevada**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

CHARLES W. TESSMER, ESQ.,

1002 Fidelity Building,

1000 Main Street,

Dallas, Texas,

For Appellant.

FRANKLIN RITTENHOUSE,

United States Attorney,

Post Office Building,

Las Vegas, Nevada;

HOWARD W. BABCOCK,

Assistant United States Attorney,

Post Office Building,

Las Vegas, Nevada,

For Appellee.



In the District Court of the United States
for the District of Nevada

No. 1358

UNITED STATES OF AMERICA,

vs.

JAMES D. BOBBROFF.

MOTION TO VACATE SENTENCE

Now comes your petitioner in the above-styled and numbered cause and would show the Honorable Court the following:

I.

Your petitioner is a prisoner in custody under the sentence of the Court established by act of Congress and that he hereby claims the right to be released upon the grounds that the sentence was imposed in violation of the Constitution and laws of the United States and would further show the Honorable Court that said sentence is subject to collateral attack in that there was no effective cumulation of the sentences imposed upon the four counts of the indictment and that said attempt to cumulate one count of the indictment is vague and indefinite.

II.

Your petitioner would further show the Honorable Court that he has at this time served completely all sentences against him, save and except the sentence imposed on Count 3 of the indictment in the above-styled and numbered cause. That is to say,

your petitioner has served sufficient time to complete the sentences on Counts 5, 4 and 8 of the indictment.

III.

Your petitioner would further show the Honorable Court that said sentence and judgment is totally defective in attempting to cumulate the punishment against your petitioner for the following reasons:

(a) The order of sequence of serving the sentences is not provided for.

(b) The sentences imposed on two of the concurrent counts are for different period of times, that is to say, five years and three years to be served concurrently and there is no provision that the sentence imposed on Count 3 is to cumulate with Count 5 or with the other counts which were for three years instead of five [2*] years, thereby rendering the said sentence uncertain.

(c) There is no provision when the commencement of the sentence on Count 3 is to begin, that is to say, when the five-year sentence terminates or when the three-year sentence would terminate and for that reason the cumulation is ineffective.

(d) The judgment expressly provides that Count 3 will run consecutive with Count 5 while the sentence contains no such provision.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Attached hereto and made a part of this motion for vacation of sentence as petitioner's Exhibit No. 1, is a properly certified copy of the official minutes of the above Court in the above-styled and numbered cause and the exact sentence as rendered in open Court. Petitioner makes this a part of this motion by reference as fully as if said Exhibit were set out herein.

IV.

Petitioner further attaches and makes a part of this motion, a statement of time served from the Federal Correctional Institution at Seagoville, Texas, Exhibit No. 2.

V.

Petitioner further attaches as a part of this motion, a certified copy of the judgment as entered in the above-numbered and styled cause and makes same a part of this motion as fully as if set out herein and would show the Court that the ministerial act of entering judgment does not follow the Judicial act of imposing sentence, Exhibit No. 3.

Wherefore, Premises Considered, your petitioner respectfully moves the Honorable Court to order this motion filed and to cause notice thereof to be served upon the United States Attorney for the above District and further, that the Honorable Court set a hearing hereon and upon a hearing of this motion that the Court make findings of fact and conclusions of law in [3] accordance with the question raised in this motion. Your petitioner further prays that the Honorable Court set aside

the sentence imposed upon Count 3 of the indictment in the above-numbered and styled cause for the reason that it is not authorized by law and is in violation of the constitutional rights of your petitioner. Your petitioner further prays that upon setting aside the said sentence that the Court order your petitioner's discharge from the Federal Correctional Institution at Seagoville, Texas, as petitioner has satisfied all other sentences.

/s/ JAMES D. BOBBROFF,
Pro Se, Petitioner.

Subscribed and sworn to before me, the undersigned authority on this the 13th day of December, A.D. 1957.

C. T. SKINNER,
Parole Officer.

Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 1004).

/s/ CHARLES W. TESSMER,
Attorney for Petitioner.

I hereby certify that a copy of this motion without Exhibits Nos. 1, 2 and 3 has been served on U. S. Attorney, District of Nevada, by mailing a copy, postage prepaid, to his office in Reno, Nevada.

/s/ CHARLES W. TESSMER.

[Endorsed]: Filed December 30, 1957. [4]

EXHIBIT No. 1

In the District Court of the United States
for the District of Nevada

No. 12,153

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES D. BOBBROFF and WILLIAM C.
CHADWELL,

Defendants.

Before: Honorable Roger T. Foley, Judge.

SENTENCE

Be It Remembered, that the above-entitled matter came on regularly for hearing before the Court at Carson City, Nevada, on Friday, the 5th of October, 1951, the plaintiff being represented by Mr. Miles N. Pike and the defendant Bobbroff being present in court with his attorney, Mr. Skinner. The following proceedings were had:

Mr. Pike: In the case of United States against James D. Bobbroff, I would like to have the record show the presence in court of the defendant Bobbroff and also the presence in court of Mr. Louis D. Skinner, one of the attorneys for Mr. Bobbroff. It is my understanding that the Court fixed this time for further proceedings to be had in the case.

The Court: The defendant may stand up. The case of the [5] United States vs. James D. Bobbroff, No. 12,153, let the record show the presence of the defendant with counsel, Mr. Skinner. Mr. Bobbroff, on the 28th day of September, 1951, a jury, duly empanelled in this court, returned a verdict in the case of the United States of America vs. James D. Bobbroff, No. 12,153, finding that you are guilty as charged as to the third count contained in the indictment and guilty as charged of the charge contained in the fourth count of the indictment and guilty as charged of the charge contained in the 5th count of the indictment and guilty of the charge contained in the 8th count of the indictment. By virtue of the verdict of the jury, you are hereby adjudged guilty of the charge contained in the 3rd count of the indictment and also by virtue of the verdict of the jury, you are hereby adjudged guilty of the charge contained in the 4th count of the indictment and adjudged guilty of the charge contained in the 5th count of the indictment and adjudged guilty of the charge contained in the 8th count of the indictment. Now have you anything to say, Mr. Bobbroff, why the judgment of the Court should not be pronounced against you according to law? A. Not guilty.

The Court: Wait a moment until we hear what the United States attorney and the probation officer have to say, then I will be glad to hear from you or your counsel.

Mr. Pike: Your Honor presided at the trial and of course heard the evidence in respect to the

contention of the parties. [6] I do not feel there is anything the United States attorney's office has in the way of information that the probation officer has not had made available to him. For that reason I believe the probation officer's report covers such additional matters outside the evidence in the case which would be of assistance to the Court.

Mr. Devine: Your Honor, the files in this case are of considerable bulk. Since the case was tried before the Court, the Court is in better position to judge as to the actual facts than anyone else. Your Honor, the defendant is 58 years of age, to his best recollection, you might say. He states he was born on the 4th of July, in probably 1894, in what he calls Pinsk, Russia. He claims the equal and equivalent of a college education in this country. He states he was educated by the use of private tutors in Russia, came to the United States when about 16 years of age, supposedly to finish his education. He says that he did receive some schooling in the United States, apparently by attendance at night school. The defendant became a citizen of the United States by virtue of service in the armed forces, honorably discharged from the United States army. He served two different enlistments with the army. At first he claimed to have served under Gen. Pershing in the Mexican campaign and then to have served his second enlistment, or greater portion thereof, in the [7] army principal headquarters and his last service with the army was in France. While in the army in France he was riding a train and there was

an accident and he received injuries. These injuries were of a very severe nature, which drove a spike thru his back which resulted in evidently some mental deterioration, also caused the removal of one of his testicles and caused severe pain for the remainder of his life in his side. The defendant now, so far as can be determined, is not able to read with very great ease. Whether it is actually a mental cause or not, at least he supposedly blacks out if he reads fine print and can only write his own name and that with considerable difficulty. After being discharged from the army he travelled eventually into the area of Portland, Oregon. He had married while stationed with the army in that vicinity. This first marriage ended in divorce in a few years. No children the result of that marriage. The defendant returned to Portland and from that time to the present he has spent all of his time on what is known now as the Eversharp lawnmower. The defendant claims to be the inventor or the co-inventor, of this lawnmower. I honestly don't know, after spending many hours discussing the matter with the defendant, going through the results of investigation compiled by the Exchange investigator, just what the true situation is, your Honor. The defendant claims that he received roughly 43 thousand dollars from the sale of personal real estate in the vicinity of Portland and disability pensions and claims, etc., [8] paid to him by the United States government, and he claims to have invested approximately 43 thousand dollars of his own money in attempting to place the lawnmower, which

was the subject matter of this case, on the market. During these early days, 15 years or more, the defendant has raised money, so far as I can determine, most of it was spent in attempting to place the lawnmower on the market and outside of his personal expenses, of course, which he had to use some of the money to live on, during this period of time, it was a process of borrowing money. Eventually a corporation was formed which, as far as I can see, on the patents of this lawnmower and Bobbroff sold some stock and issued stock certificates as security for the money borrowed and then finally fairly recently, after this corporation was in such a position that the defendant spent by the government about 150 thousand dollars in the first corporation, the defendant indicates there was not very much money spent, maybe 60 thousand something like that. He alleges that was all spent honestly in attempting to place this lawnmower on the market. Then the defendant was referred to Reno, Nevada. Later the second corporation was organized. This corporation received from the original corporation which held the patents, the right to the manufacture or have manufactured and sell lawnmowers. Mr. Bobbroff came to Reno and there was considerable front put up, including this suit at the Mapes Hotel. As I understand the case, this case [9] hinges on the fact that misrepresentations were made as to what the situation, so far as the manufacture of lawnmowers is concerned, is. The record indicates, your Honor, that Bobbroff has made some payments back to

those people, how much I do not know. The defendant, of course, does not consider himself a criminal. He talks to me—is a very convincing talker, too—he talks like his whole life is wrapped up in the invention. He treats this invention like it was a child. In fairness to the defendant—it impresses me, of course I only talked six or seven times with the defendant—how was a man that was dealing with a lot of other people who were probably of equal or maybe superior intelligence to this defendant. An attorney in Reno represented the corporation, of course; a man named Barber invested some money, had something to do with the corporation, but Mr. Bobbroff apparently is the man that received the money from selling some stock, which I understand was promotion stock, which shouldn't have been sold at all. Of course, his co-defendant in the case, there has been no verdict rendered on that case and we have Mr. Bobbroff before the court for sentence. He denies the corporation funds were placed across the game tables. There has been a question, your Honor, about this man working upon the heart-strings of these different women, even in Reno. The defendant relates, because of his physical disability, which I have stated, he is not in fact an amorous person, in fact, stays away from his home at the present time because of [10] his physical disability. I believe the Court is certainly in a better position than I am to make the final decision just what the situation is. I have tried to present all that has come to me from questioning the defendant. The defendant has no prior criminal rec-

ord, your Honor. There is a record where he was arrested on three or four occasions in Portland on various charges. However, there was no disposition ever made of those charges and the FBI fingerprint indicates this is the first felony charge against him. He was never fingerprinted previously.

The Court: Does counsel for the defendant desire to make any statement?

Mr. Skinner: Yes, your Honor please. The indictment involved two elements, first the representations, and secondly, disposition of the money. For your Honor's consideration, I would like to point out that there was no evidence as to just the disposition of the money was. Mr. Barber, Mr. Zapf, as I think your Honor will recall, all testified to the fact that the expenses of the corporation were paid by Mr. Bobbroff, other than such items as were shown by disbursements from the two accounts that were in evidence. It also appears from the testimony of the government's witnesses that Mr. Bobbroff was a rather poor business man, but had surrounded himself with some talent for taking care of legal matters in connection with the corporation and also the office management. It is [11] also quite obvious from the evidence that that was not done. They kept no books, they kept no records, although Mr. Barber testified that he was an accountant. I would suggest the Court consider that, inasmuch as reviewing all the evidence, I could see where there was no evidence at all as to the disposition of this money as alleged in the indictment, that it was not

used for corporate purposes. I think Mr. Devine has quite fully covered the matter and rather impartially. One thing I would like to add. I do not know whether Mr. Devine looked at the V. A. records to any extent, but the defendant here draws a disability pension and the V. A. record shows that Mr. Bobbroff is 30 per cent psychoneurotic. I wasn't able to find just exactly what that means, 30 per cent psychoneurotic as distinguished from 50 per cent. However, the V. A. record does substantiate the fact that he is a very poor business man, not able to do very much, not able to read except with considerable difficulty. That is all I have.

The Court: You may stand up, Mr. Bobbroff. I have read the report and was attracted by the last statement of your counsel and while I am talking about your counsel, I want to again say what I said before the jury, Mr. Bobbroff—you couldn't have had a more able defense if you had paid attorneys a thousand dollars a day for the two weeks that we were here in court. Everything that possibly could be done by an attorney in the [12] defense of another individual was done for you.

Now referring to this last statement of Mr. Skinner, you may not be able to read English, I don't know, but that feature doesn't appear to me at all. I think you are a very well informed man and that is the basis on which I am going to act. In other words, I do not think any ignorance on your part contributes at all to the position you find yourself in here today. I am not going to say anything

to you or make any remarks that might leave a hard feeling or grief or anything of that kind in your mind, but you have reached the end of the trail. I note also that you have no criminal record on paper. That amounts to this, you have never yet been caught but you have reached the end of the trail, I think. You have cost a lot of people a lot of money, brought a lot of distress to a great many people. So it is the judgment of the Court that the defendant is guilty of the offense charged in the 5th count of the indictment, which I think you understand is a rather long charge, covers matters that are set forth in the first count. You were here in court, of course, every moment of the trial, you know very well what the 5th count contains. It refers particularly to your depositing in the mail matters forwarded and addressed to Mrs. Gertrude Olness. You are adjudged guilty of that offense and you are, for that offense, committed to the custody of the Attorney General for the period of five years and [13] fined in the sum of two thousand dollars. On the charge contained in the third count, you are adjudged guilty of that offense and you are committed to the custody of the Attorney General for the period of three years and fined in the sum of one thousand dollars. On the charge contained in the 4th count of the indictment, you are adjudged to be guilty by virtue of the verdict of the jury, and you are hereby committed to the custody of the Attorney General for the period of three years and fined in the sum of one thousand dollars. By virtue of the verdict of the jury, you are adjudged guilty

of the charge contained in the 8th count and for that charge in the count you are committed to the custody of the Attorney General for the period of three years and fined in the sum of one thousand dollars. The sentences imposed on Count 4 will be concurrent with that imposed on Count 5, so far as the imprisonment is concerned. The sentence imposed on Count 8 is concurrent with the sentence imposed on Count 5, insofar as the imprisonment is concerned. The total term of imprisonment is eight years. The total fine imposed is five thousand dollars. You are fined one thousand dollars on Count 3, you are fined two thousand dollars on Count 5; on Count 8 you are fined one thousand dollars; on Count 4 you are fined one thousand dollars. The sentence imposed on the third count is consecutive. So the defendant is remanded to the custody of the [14] marshal.

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had in the foregoing-entitled matter and that the foregoing pages, numbered 1 to 11, including this page, comprise a full, true, and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, October 24, 1951.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed October 26, 1951. [15]

EXHIBIT No. 2

United States Department of Justice
Federal Correctional Institution
Seagoville, Texas

November 19, 1957.

Mr. Charles W. Tessmer,
Attorney at Law,
1002 Fidelity Building,
1000 Main Street,
Dallas, Texas.

Re: Bobbroff, James D.,
Reg. No. 6467-ST.

Dear Mr. Tessmer:

With reference to your letter dated November 15th requesting the total amount of time served by the above-named man, please be advised that as of this date Bobbroff has served 4 years, 7 months and 23 days in Federal custody.

Although Bobbroff was sentenced on October 5, 1951, he had a total of 538 days inoperative time while on appeal.

We trust this is the information you desire, and if we may be of any further service, please call upon us.

Sincerely yours,

/s/ L. P. GOLLAHER,
Warden.

Certified as correct.

/s/ G. W. JAMES,
Record Clerk. [16]

EXHIBIT No. 3

United States District Court
District of Nevada

No. 12,153

UNITED STATES

vs. ,

JAMES D. BOBBROFF and WILLIAM C.
CHADWELL.

MINUTES OF COURT, OCTOBER 5, 1951

This being the time heretofore fixed for imposition of sentence in this case and the same coming on regularly this day. The defendant, James D. Bobbroff, is present in custody of the marshal, and with his attorney, Louis V. Skinner, thereupon the Court pronounces judgment on Counts 3, 4, 5 and 8 of the Indictment as follows: "It Is Adjudged

that the defendant is guilty as charged in the Indictment and convicted. It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years and Two Thousand (\$2,000) Dollars Fine, to be paid to the U. S. on Count 5; Three (3) Years and One Thousand (\$1,000) Dollars Fine, to be paid to the U. S. on Count 3; Three (3) Years and One Thousand (\$1,000) Dollars Fine, to be paid to the U. S. on Count 4; Three (3) Years and One Thousand (\$1,000) Dollars Fine, to be paid to the U. S. on Count 8; It Is Further Ordered that the prison sentence imposed on Count 4 will run Concurrently with the prison sentence imposed on Count 5; and that the prison sentence imposed on Count 8 will run Concurrently with the prison sentence imposed on Count 5; and that the sentence imposed on Count 3 will run Consecutively with the sentence imposed on Count 5; the total prison sentence is 8 years and the total fine is \$5,000.00. It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant. The Court recommends commitment to: A Federal Penitentiary. Roger T. Foley, Judge." Defendant is remanded to the custody of the Marshal.

Attest: A True and Correct Copy.

[Seal]

OLIVER F. PRATT,

Clerk. [17]

District Court of the United States
for the District of Nevada

No. 12,153

UNITED STATES OF AMERICA

vs.

JAMES D. BOBBROFF.

JUDGMENT AND COMMITMENT

Criminal Indictment for Viol. of T. 15, U.S.C., S.
77q (a) (1), and T. 18, U.S.C., S. 1341.

On this 5th day of October, 1951, came the attorney for the government and the defendant appeared in person and by counsel, Louis V. Skinner, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a verdict of guilty of the offense of (copy of offenses attached) as charged in the Indictment, Counts 3, 4, 5, 8, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years and Two Thousand

(\$2,000) Dollars Fine, to be paid to the U. S. on Count 5; Three (3) Years and One Thousand (\$1,000) Dollars Fine, to be paid to the U. S. on Count 3; Three (3) Years and One Thousand (\$1,000) Dollars Fine, to be paid to the U. S. on Count 4; Three (3) Years and One Thousand (\$1,000) Dollars Fine, to be paid to the U. S. on Count 8; It Is Further Ordered that the prison sentence imposed on Count 4 will run Concurrently with the prison sentence imposed on Count 5; and that the prison sentence imposed on Count 8 will run Concurrently with the prison sentence imposed on Count 5; and that the sentence imposed on Count 3 will run Consecutively with the sentence imposed on Count 5; the total prison sentence is 8 years and the total fine is \$5,000.00.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to: A Federal Penitentiary.

/s/ ROGER T. FOLEY,

United States District Judge.

AMOS P. DICKEY,

Clerk;

By /s/ SIDNEY R. WHITMORE,

Deputy Clerk. [18]

Return

I have executed the within Judgment and Commitment as follows:

Defendant delivered on October 5, 1951, to Washoe County Jail, Reno Nevada.

Defendant noted appeal on October 8, 1951.

Defendant released on \$5,000.00 Bond September 6, 1952.

Defendant elected, on October 15, 1951, not to commence service of the sentence.

Defendant's appeal determined on April 6, 1953.

Defendant delivered on April 20, 1953, to Warden, Federal Penitentiary, at Leavenworth, Kansas, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

LEONARD R. CARPENTER,
United States Marshal;

By /s/ FRANK SADECHI,
Deputy U. S. Marshal.

INDICTMENT

First Count: (Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C., S 77q(a)(1)).

The Grand Jury charges:

1. Since on or about July 1, 1948, and continuing until about the date of this Indictment, the

defendants, James D. Bobbroff and William C. Chadwell, sometimes hereinafter referred to as the defendants, devised and intended to devise a scheme and artifice to defraud a certain class of persons, hereinafter referred to as the persons to be defrauded, being generally that class of persons whom the defendants believed could be induced to purchase and invest and reinvest in certain securities, to wit: The capital stock, \$5 par value, of Eversharp Launwhiz, Inc., and certain promissory notes of the defendant, James D. Bobbroff secured by shares of the capitol stock, \$5 par value, of Eversharp Launwhiz, Inc., and certain other promissory notes of the defendant, James D. Bobbroff, secured by shares of the Class B common stock, \$1 par value, of Eversharp Lawnmower Company, and said scheme and artifice to defraud was in substance as follows:

2. That the defendants would and they did cause Eversharp Launwhiz., Inc., to be incorporated under the laws of the State of Nevada with an authorized capital of \$1,500,000, represented by 300,000 shares of \$5 par value capital stock, to engage in the manufacture and marketing of lawnmowers and parts thereof.

3. That Eversharp Lawnmower Company was and is a corporation incorporated under the laws of the State of Nevada with an authorized capital of \$300,000, represented by 15,000 shares of Class A common stock of a par value of \$10 per share and 150,000 shares of Class B common stock of a par value of \$1 per share, and that the defendant,

James D. Bobbroff, would and he did on or about August 17, 1948, enter into a certain agreement with Eversharp Lawnmower Company by the terms of which the defendant, James D. Bobbroff, received from Eversharp Lawnmower Company the exclusive right and license to manufacture and sell on a royalty basis lawnmowers and parts thereof as described in said agreement, and that the defendant, James D. Bobbroff, would and he did on or about February 4, 1949, assign his interest in said agreement to Eversharp Launwhiz, Inc., in consideration of the issuance to the defendant, James D. Bobbroff, of 135,000 shares of the capital stock, \$5 par value, of Eversharp Launwhiz, Inc.

4. That the defendants, James D. Bobbroff and William C. Chadwell, would and they did, in order to deceive and mislead the persons to be defrauded, falsely and fraudulently represent and state to them that funds invested in the capital stock, \$5 par value, of Eversharp Launwhiz, Inc., and the promissory notes issued by the defendant, James D. Bobbroff, would be used to manufacture Eversharp Lawnmowers or to meet necessary expenses of Eversharp Launwhiz, Inc., while negotiations were being consummated with reliable manufacturers to build Eversharp Lawnmowers on a royalty basis, when in truth and in fact, as the defendants well knew, but concealed from and omitted to state to the persons to be defrauded, the capital stock, \$5 par value, of Eversharp Launwhiz, Inc., was being sold by and for the benefit of the defendants, James D. Bobbroff

and William C. Chadwell, and not by and for the benefit of Eversharp Launwhiz, Inc., and the defendants intended to and did, at least in part, appropriate to their own uses and purposes the funds received from the sale of such stock, together with the funds received from the sale of the promissory notes issued by the defendant, James D. Bobbroff.

5. That the defendants, James D. Bobbroff and William C. Chadwell, would and they did for the purpose and with the intent of misleading and deceiving the persons to be defrauded, and to induce them to purchase, invest and reinvest in the securities described in paragraph 1 hereof, make and cause to be made to them numerous false and fraudulent representations, promises and pretenses, in addition to those heretofore specified, said additional false and fraudulent representations, pretenses and promises being in substance as follows, to wit: [19]

(a) That Eversharp Launwhiz, Inc., had acquired the trade-mark name of "Eversharp Launwhiz," together with all patents and patents pending formerly the property of James D. Bobbroff, the inventor.

(b) That the main plant of Eversharp Launwhiz, Inc., was in Belmont, California, where Erie Manufacturing Company was producing 100-200 machines daily.

(c) That Motor-mower Co. of Detroit was geared to produce 500 to 1,000 lawnmowers

daily and would go into production in the near future.

and each and every one of said representations, pretenses and promises, as the defendants well knew, was false and fraudulent and intended by the defendant so to be, and was made in order to deceive and defraud the persons to be defrauded.

6. That on or about March 29, 1949, the defendants, James D. Bobbroff and William C. Chadwell, so having devised said scheme and artifice to defraud, did, at Winnemucca, Nevada, in the District of Nevada, and within the jurisdiction of this Court, in the sale of securities, to wit: Shares of the capital stock, \$5 par value, of Eversharp Launwhiz, Inc., and certain promissory notes of the defendant, James D. Bobbroff, more fully described in paragraph 1 above, by the use of the United States mails, unlawfully, wilfully, knowingly and feloniously, employ said scheme and artifice to defraud, and said use of the United States mails was in the manner following, to wit:

The defendants, James D. Bobbroff and William C. Chadwell, on or about March 29, 1949, at Winnemucca, Nevada, in the District of Nevada, and within the jurisdiction of this Court, knowingly caused to be delivered by the United States mails, according to the direction thereon, a letter enclosed in a postpaid envelope, addressed to Mr. Rosio Echave, P. O. Box 533, Winnemucca, Nevada.

Third Count (Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C., S 77q(a)(1)):

The Grand Jury charges:

1. The Grand Jury realleges all of the allegations of the First Count of this Indictment except those contained in paragraph 6 thereof.

2. That on or about October 3, 1949, the defendant, James D. Bobbroff, so having devised said scheme and artifice to defraud, did, at Winnemucca, Nevada, in the District of Nevada, and within the jurisdiction of this Court, in the sale of securities, to wit: Shares of the capital stock, \$5 par value, of Eversharp Launwhiz, Inc., and certain promissory notes of the defendant, James D. Bobbroff, more fully described in paragraph 1 of the First Count, by the use of the United States mails, unlawfully, wilfully, knowingly and feloniously, employ said scheme and artifice to defraud, and said use of the United States mails was in the manner following, to wit:

The defendant, James D. Bobbroff, on or about October 3, 1949, at Winnemucca, Nevada, in the District of Nevada, and within the jurisdiction of this Court, knowingly caused to be delivered by the United States mails, according to the direction thereon, a letter enclosed in a postpaid envelope, addressed to Mr. Rosio Echave, P. O. Box 533, Winnemucca, Nevada.

Fourth Count (Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C., S 77q(a)(1)):

The Grand Jury charges:

1. The Grand Jury realleges all of the allegations of the First Count of this Indictment except those contained in paragraph 6 thereof. [20]

2. That on or about October 3, 1949, the defendant, James D. Bobbroff, so having devised said scheme and artifice to defraud, did, at Winnemucca, Nevada, in the District of Nevada, and with the jurisdiction of this Court, in the sale of securities, to wit: Shares of the capital stock, \$5 par value, of Eversharp Launwhiz, Inc., and certain promissory notes of the defendant, James D. Bobbroff, more fully described in paragraph 1 of the First Count, by the use of the United States mails, unlawfully, wilfully, knowingly and feloniously, employ said scheme and artifice to defraud, and said use of the United States mails was in the manner following, to wit:

The defendant, James D. Bobbroff, on or about October 3, 1949, at Winnemucca, Nevada, in the District of Nevada, and within the jurisdiction of this Court, knowingly caused to be delivered by the United States mails, according to the direction thereon, a letter enclosed in a postpaid envelope, addressed to Mr. George S. Haskins, c/o First National Bank, Winnemucca, Nevada.

Fifth Count (Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C., S 77q(a)(1)):

The Grand Jury charges:

1. The Grand Jury realleges all of the allegations of the First Count of this Indictment except those contained in paragraph 6 thereof.

2. That on or about October 3, 1949, the defendant, James D. Bobbroff, so having devised said scheme and artifice to defraud, did, at Reno, Nevada, in the District of Nevada, and within the jurisdiction of this Court, in the sale of securities, to wit: Shares of the capital stock, \$5 par value, of Eversharp Launwhiz, Inc., and certain promissory notes of the defendant, James D. Bobbroff, more fully described in paragraph 1 of the First Count, by the use of the United States mails, unlawfully, wilfully, knowingly and feloniously, employ said scheme and artifice to defraud, and said use of the United States mails was in the manner following, to wit:

The defendant, James D. Bobbroff, on or about October 3, 1949, at Reno, Nevada, in the District of Nevada, and within the jurisdiction of this Court, knowingly caused to be placed in an authorized depository for mail matter a letter enclosed in a postpaid envelope, addressed to Mrs. Gertrude Olness, 2542 Durant Street, Berkeley, California, to be sent or delivered by the Post Office Establishment of the United States.

Eighth Count (Criminal Code, Section 215, 18 U.S.C., S 338 (now 18 U.S.C., S 1341)):

The Grand Jury charges:

1. The Grand Jury realleges all of the allegations of the first count of this Indictment except those contained in paragraph 6 thereof.

2. That on or about October 3, 1949, the defendant, James D. Bobbroff, at Winnemucca, Nevada, in the District of Nevada, and within the jurisdiction of this Court, for the purpose of executing said scheme and artifice and attempting to do so, knowingly caused to be delivered by the United States mails, according to the direction thereon, a letter enclosed in a postpaid envelope, addressed to Mr. Mateo C. Legarza, 322 Bridge Street, Winnemucca, Nevada. [21]

I, James D. Bobbroff, acknowledge that I was tried in Federal Court at Carson City, Nevada, on September 10-28, 1951, and was found guilty on a charge of violation of the Securities Act of 1933 and Mail Fraud, and was sentenced to Eight (8) years and fined \$5,000.00 on October 5, 1951, and that an appeal was filed and noted in my behalf on October 8, 1951. I elect not to begin serving my sentence.

Dated at Reno, Nevada, this 15th day of October, 1951.

/s/ JAMES D. BOBBROFF,
Signature of Prisoner.

In Presence of:

/s/ FRED BENNETT,

Witness;

/s/ J. J. WOOD,

Witness. [22]

(Copy)

Department of Justice
Bureau of Prisons
Washington 25

March 6, 1953.

Air Mail

Mr. Leonard R. Carpenter,
United States Marshal,
Reno, Nevada.

Dear Sir:

The United States Penitentiary, Leavenworth, Kansas, is designated as the place of confinement for James D. Bobbroff, for classification and medical observation.

Sincerely yours,

/s/ J. V. BENNETT,

JAMES V. BENNETT,

Director.

- [Endorsed]: Filed April 27, 1953.

[Title of District Court and Cause.]

COPY OF DOCKET ENTRY
OF JANUARY 16, 1958

1-16-58—It Is Ordered, that this matter, be, and the same hereby is, taken advisement by the Court as to the Motion to Vacate Sentence.

Attest: A True and Correct Copy.

[Seal] /s/ OLIVER F. PRATT,
Clerk;

By /s/ J. P. FODRIN,
Deputy. [24]

United States District Court
for the District of Nevada

No. 1358

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES D. BOBBROFF,

Defendant.

OPINION, FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Defendant Bobbroff moves to vacate sentence under § 2255, Title 28, U.S.C.A.

Defendant was found guilty in the United States District Court for the District of Nevada of violation of Counts 3, 4, 5 and 8 of an indictment Counts 3, 4 and 5 charged the use of the mails in an offer to dispose of, to three shareholders in a Nevada corporation, Eversharp Launwhiz, Inc., further shares therein by employing a scheme to defraud in violation of the Securities Act of 1933, 15 U.S.C.A., § 77q(a)(1). Count 8 charged a similar use of the mails in an attempt to sell further shares to another shareholder of Eversharp Launwhiz, Inc., in violation of the mail fraud Statute, 18 U.S.C., § 1341. On February 25, 1953, the United States Court of Appeals, Ninth Circuit, affirmed the judgment, 202 F. 2d 389.

In Paragraph II of his motion the defendant contends:

“That he has at this time [December 13, 1957] served completely all sentences against him, save and except the sentence imposed on Count 3 of the indictment * * *. That is to say, your petitioner has served sufficient time to complete the sentences on Counts 5, 4 and 8 of the indictment.” [25]

In Paragraph III we find a statement of grounds of the motion:

“(a) The order of sequence of serving the sentences is not provided for.

“(b) The sentences imposed on two of the concurrent counts are for different period of

times, that is to say, five years and three years to be served concurrently and there is no provision that the sentence imposed on Count 3 is to cumulate with Count 5 or with the other counts which were for three years instead of five years, thereby rendering the said sentence uncertain.

“(c) There is no provision when the commencement of the sentence on Count 3 is to begin, that is to say, when the five-year sentence terminates or when the three-year sentence would terminate and for that reason the cumulation is ineffective.

“(d) The judgment expressly provides that Count 3 will run consecutive with Count 5 while the sentence contains no such provision.”

Petitioner, by reference, has made three exhibits parts of his motion. It will be noted that in Paragraph III of the motion Exhibit No. 1 is erroneously referred to as “a properly certified copy of the official minutes of the above Court in the above-styled and numbered cause and the exact sentence as rendered in open Court.” Exhibit No. 1 is the reporter’s transcript of proceedings of October 5, 1951, while Exhibit No. 3 is a certified copy of the minutes of the Court of October 5, 1951. Exhibit No. 2, likewise made a part of the motion, is a statement of time served in Federal Correctional Institution.

From the reporter’s transcript of proceedings of

October 5, 1951, Exhibit No. 1 herein, among other things, the following appears:

“The Court [In addressing the defendant]:
* * * So it is the judgment of the Court that the defendant is guilty of the offense charged in the 5th count of the indictment, * * *. You are adjudged guilty of that offense and you are, for that offense, committed to the custody of the Attorney General for the period of five years and fined in the sum of two thousand dollars. On the charge contained in the third count, you are adjudged guilty of that offense [26] and you are committed to the custody of the Attorney General for the period of three years and fined in the sum of one thousand dollars. On the charge contained in the 4th count of the indictment, you are adjudged to be guilty by virtue of the verdict of the jury, and you are hereby committed to the custody of the Attorney General for the period of three years and fined in the sum of one thousand dollars. By virtue of the verdict of the jury, you are adjudged guilty of the charge contained in the 8th count and for that charge in the count you are committed to the custody of the Attorney General for the period of three years and fined in the sum of one thousand dollars.

“The sentences imposed on Count 4 will be concurrent with that imposed on Count 5, so far as the imprisonment is concerned. The sentence imposed on Count 8 is concurrent with

the sentence imposed on Count 5, insofar as the imprisonment is concerned. The total term of imprisonment is eight years. The total fine imposed is five thousand dollars. You are fined one thousand dollars on Count 3, you are fined two thousand dollars on Count 5; on Count 8 you are fined one thousand dollars; on Count 4 you are fined one thousand dollars. The sentence imposed on the third count is consecutive.”

In Exhibit No. 3 herein, minutes of Court, among other things, we find the following:

“* * * It Is Further Ordered that the prison sentence imposed on Count 4 will run Concurrently with the prison sentence imposed on Count 5; and that the prison sentence imposed on Count 8 will run Concurrently with the prison sentence imposed on Count 5; and that the sentence imposed on Count 3 will run Consecutively with the sentence imposed on Count 5; the total prison sentence is 8 years and the total fine is \$5,000.00. * * *”

It is to be noted that the minutes expressly state: “That the sentence imposed on Count 3 will run consecutively with the sentence imposed on Count 5; the total prison sentence is 8 years and the total fine is \$5,000.00,” and that the reporter’s transcript, Exhibit No. 1, as above shown, states “the sentence imposed on the third count is consecutive. * * *” The minutes of the Court obviously were made up

from the Clerk's notes made at the time of rendition of sentence and the reporter's transcript is made up of shorthand notes made at the time of the rendition of the sentence. No good reason appears to the Court why greater credence should be given to the reporter's shorthand [27] notes and her transcript than that which should be given to the Clerk's notes and to the "minutes" based upon them. However, regardless of which should control, the duration of the terms of imprisonment are made clear by the language of the reporter's transcript. If it is to be assumed that the language of the transcript is correct, the most that can be said in support of defendant's contention is that while more precise language might have been used, the duration of the terms of imprisonment are made clear by the language of the reporter's transcript. It is apparent therefrom that the language of the transcript itself provided that after the defendant had served the five-year term imposed under Count 5 of the indictment, the terms imposed upon each of Counts 4 and 8 would have been completed, the imprisonment terms on Counts 4 and 8 having been expressly made concurrent with the sentence imposed on Count 5, leaving remaining to be served a consecutive sentence imposed on Count 3. It was made plain to the defendant that the total term of imprisonment was to be eight years. After completion of the sentences imposed on Counts 5, 4 and 8, but five years would have been served. Therefore, it must have been apparent to him that the sentence on Count 3, which was a consecutive sentence, was to be served after the completion of the

five-year term imposed on Count 5. No other construction would be consistent with the announced intention of the Court to make the total period of imprisonment eight years.

In *United States v. Daugherty*, 269 U.S. 360 on 363, Mr. Justice McReynolds, speaking for the Court, stated:

“Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. The elimination of every possible doubt cannot be demanded. Tested by this standard the judgment here questioned was sufficient to impose total imprisonment for fifteen years made up of three five-year terms, one under the first count, one under the second and one under the third, to be [28] served consecutively and to follow each other in the same sequence as the counts appeared in the indictment. This is the reasonable and natural implication from the whole entry. The words, ‘said term of imprisonment to run consecutively and not concurrently,’ are not consistent with a five-year sentence.”

Findings of Fact

Therefore, the Court finds:

1. That the sentence imposed upon the defendant was, in substance, as follows: Five years' imprisonment and \$2,000 fine on Count 5; three years' im-

prisonment and \$1,000 fine on Count 3; three years' imprisonment and \$1,000 fine on Count 4; three years' imprisonment and \$1,000 fine on Count 8; that the prison sentence imposed on Count 4 to run concurrently with the prison sentence imposed on Count 5; that the prison sentence imposed on Count 8 to run concurrently with the prison sentence imposed on Count 5; that the prison sentence imposed on Count 3 will run consecutively with the sentence imposed on Count 5, and that the total prison sentence is eight years and the total fine is \$5,000.

2. That the judgment and sentence was within the jurisdiction of the Court and was authorized by law.

Conclusions of Law

The Court concludes:

1. That defendant's motion should be, and it hereby is, denied.

Let Judgment Be Entered Accordingly.

Dated: This 28th day of January, 1958.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed January 28, 1958. [29]

[Title of District Court and Cause.]

COPY OF DOCKET ENTRY OF
JANUARY 30, 1958

1-30-58—Ordered that defendant Brobbroff's Motion to Vacate Sentence Under Sec. 2255, T. 18, U.S.C., be, and the same hereby is, denied.

1-30-58—Rittenhouse, Babcock and Tessmer advised of the entry of above order and judgment.

Attest: A True and Correct Copy.

[Seal] /s/ OLIVER F. PRATT,
Clerk;

By /s/ J. P. FODRIN,
Deputy. [30]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Defendant (Petitioner) James D. Bobbroff, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from an order filed on January 28, 1958, overruling his Motion to Vacate Sentence under Title 28, Section 2255, U.S.C., and from the Judgment entered thereon on January 30, 1958, in the Minutes of the United States District Court for the District of Nevada, denying the Defendant's (Peti-

tioner's) motion to vacate sentence under Title 28, Section 2255, U.S.C.

/s/ JAMES D. BOBBROFF,
Pro Se;

By /s/ CHARLES WILLIAM TESSMER,
Attorney for Defendant
(Petitioner).

Certificate

I, Charles William Tessmer, hereby certify that on this, the 5th day of February, 1958, a copy of this Notice of Appeal was served upon the United States District Attorney for the District of Nevada, by mailing to his office at P. O. Box 1889, Las Vegas, Nevada, postage prepaid, a copy thereof.

/s/ CHARLES W. TESSMER,
Attorney for Defendant
(Petitioner).

[Endorsed]: Filed February 10, 1958. [31]

[Title of District Court and Cause.]

No. 1358

BOND FOR COSTS

Know all men that we, James D. Bobbroff, as principal, and Charles W. Tessmer, as surety, do hereby acknowledge ourselves bound jointly and severally to pay to United States of America and the officers of said court the full sum of the costs

that have accrued and may accrue in the above-entitled and numbered cause, conditioned that James D. Bobbroff, plaintiff in the above-entitled suit, will pay all costs that may be adjudged against him in said suit during the pendency or at the final determination thereof; and judgment for the said costs may be rendered against us, to be entered in the final judgment in the cause; and also for any cost incurred in the Court of Appeals for the 9th Circuit in this cause and that I, James D. Bobbroff, have heretofore given security in the amount of \$250.00 to the Clerk of the above Court.

Witness our hands this 11th day of Feb., 1958.

/s/ JAMES D. BOBBROFF,

/s/ CHARLES W. TESSMER.

Sworn to and subscribed before me by the said James D. Bobbroff this 11th day of Feb., 1958, to certify which witness my hand and seal of office.

/s/ A. L. LINDGREN,

Authorized by the Act of July 7, 1955, to Administer Oaths (18 U.S.C. 4004).

Sworn to and subscribed before me by the said Charles W. Tessmer this 12th day of Feb., 1958, to certify which witness my hand and seal of office.

[Seal] /s/ LASSIE JO SELF,

Notary Public in and for Dallas County, Texas.

[Endorsed]: Filed February 17, 1958. [32]

[Title of District Court and Cause.]

No. 1358

CERTIFICATE OF CLERK, U. S.
DISTRICT COURT

United States of America,
District of Nevada—ss.

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the accompanying documents, listed in the attached index, are the originals filed in this court, or true and correct copies of docket entries and court minutes of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 5th day of March, 1958.

[Seal] /s/ OLIVER F. PRATT,
Clerk, U. S. District
Court. [35]

[Endorsed]: No. 15928. United States Court of Appeals for the Ninth Circuit. James D. Bobbroff, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed March 7, 1958.

Docketed March 13, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15928

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES D. BOBBROFF,

Defendant.

STATEMENT OF POINTS UPON WHICH AP-
PELLANT INTENDS TO RELY IN THIS
APPEAL

Now comes the defendant-appellant in the above-numbered and entitled cause and respectfully would show the Honorable Court that he intends to rely in this appeal upon the following points:

1. That the Judgment and Sentence in the original Cause No. 12153, Criminal, in the District Court of the United States for the District of Nevada, will not support a cumulation of the sentences attempted to be imposed against defendant-appellant, because the sentences attempted to be imposed were vague, uncertain and indefinite and did not provide for the proper sequence of serving and expressly provided in the judgment that said sentences were to run consecutive with one another.

2. That the Judgment and Commitment do not conform to the actual sentence of the District Court, which consists of the reporter's transcript of the proceedings of October 5, 1951, same being the

actual judgment in the case and the Judgment and Commitment as reflected by the minutes of the Clerk, dated October 5, 1951, which was the ministerial judgment entered upon the sentence previously imposed.

3. That the District Court erred in overruling defendant-appellant's motion to vacate sentence for the reason that the attempted cumulation of Count 3 with the other Counts in the original indictment against appellant is ineffective and is not supported by the documentary evidence adduced at the hearing before the trial court.

/s/ JAMES D. BOBBROFF,
Pro Se;

By /s/ CHARLES W. TESSMER,
Attorney for Defendant-
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 13, 1958.

No. 15928

In the
United States Court of Appeals
FOR THE NINTH CIRCUIT

JAMES D. BOBBROFF,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

*Appeal from the United States District Court
for the District of Nevada*

BRIEF ON BEHALF OF APPELLANT

CHARLES WILLIAM TESSMER,
1002 Fidelity Bldg.,
Dallas, Texas,
Attorney for Appellant.

FILED
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No. 15928

In the
United States Court of Appeals
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JAMES D. BOBBROFF,

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v.

UNITED STATES OF AMERICA,

Appellee.

*Appeal from the United States District Court
for the District of Nevada*

BRIEF ON BEHALF OF APPELLANT

JURISDICTION OF THE COURT OF APPEALS

The pleadings in this case consist of the Motion to Vacate Sentence. The judgment in this case consists of the trial court's Order, overruling the Motion to Vacate Sentence and the Judgment based thereon.

Jurisdiction of the trial court and of the Honorable Court of Appeals is invoked by virtue of *Title 28, U. S. C. A., Section 2255*. (Appendix A., R. 19.)

STATEMENT OF THE NATURE AND RESULT OF THE CASE

Appellant was found guilty in the United States District Court for the District of Nevada of violation of Counts 3, 4, 5 and 8 of an indictment. Counts 3, 4 and 5 charged the use of the mails in an offer to dispose of, to three shareholders in a Nevada corporation, Eversharp Launwhiz, Inc., further shares therein by employing a scheme to defraud in violation of the Securities Act of 1933, *15 U. S. C. A., Sec. 77q(a) (1)*. Count 8 charged a similar use of the mails in an attempt to sell further shares to another shareholder of Eversharp Launwhiz, Inc. in violation of the mail fraud Statute, *18 U. S. C., Sec. 1341*. On February 25, 1953, the United States Court of Appeals, Ninth Circuit, affirmed the judgment *202 F. 2d 389*.

The question of the ineffective cumulation of the Sentences imposed was not presented in the original appeal.

Appellant filed Civil Action No. 1358, a statutory motion to vacate sentence and said motion was overruled by the trial court on January 28, 1958, and said order and judgment was filed on the 20th day of January, 1958. Appellant gave notice of appeal within the time allowed by law and the case is properly before the Honorable Court of Appeals for a decision on the merits. Appellant deems the motion to vacate sentence (R. 3) as a complete, concise, abstract statement of the case and the questions involved herein.

The attention of the Honorable Court is respectfully invited to said motion (R. 3).

Appellant, by motion to vacate the judgment and sentence entered in Cause No. 12153 in the District Court of the United States for the District of Nevada, takes the position that the attempt to cumulate Count 3 and the sentence imposed thereon, with other counts in the indictment in the above numbered and styled cause, was ineffective because the cumulation attempted was vague, indefinite and uncertain, for the following reasons:

(1) The order of sequence of serving the sentences is not provided for.

(2) The sentences imposed on two of the concurrent counts are for different periods of time, that is to say, 5 years and 3 years to be served concurrently, and there is no provision that the sentence imposed on Count 3 is to cumulate with Count 5 or with other counts which were for 3 years instead of 5 years, thereby rendering said sentence uncertain.

(3) There is no provision when the commencement of the sentence on Count 3 is to begin, that is to say, when the 5-year sentence terminates or when the 3-year sentence would terminate, and for that reason, the cumulation is ineffective.

(4) The judgment will not support the actual sentence of the Court, which is reflected by the reporter's transcript of the Minutes at the sentencing of Appellant, for the

reason that the judgment expressly provides that Count 3 will run consecutive with Count 5, while the sentence contains no such provision.

Appellant has served a sufficient length of time to completely satisfy all counts of the indictment, except Count 3, to which Appellant makes the claim of an ineffective cumulation.

EVIDENCE

The evidence in this case consists of Appellant's Exhibit No. 1, same being a certified copy of the official minutes of the United States District Court in the original Cause No. 12153, Criminal, as reflected by the shorthand reporter's notes of the comments of the Court in imposing the sentence on Appellant. Appellant's Exhibit No. 2, being a statement of time served from the Federal Correctional Institution at Seagoville, Texas. Appellant's Exhibit No. 3, a certified copy of the Judgment as entered in Cause No. 12153, Criminal.

SPECIFICATIONS OF ERROR

SPECIFICATION OF ERROR NO. 1

That the Judgment and Sentence in the original Cause No. 12153, Criminal, in the District Court for the United States for the District of Nevada, will not support a cumulation of the sentences attempted to be imposed against defendant-appellant, because the sentences attempted to be imposed were vague, uncertain and indefinite and did not

provide for the proper sequence of serving and expressly provided in the judgment that said sentences were to run consecutive with one another.

SPECIFICATION OF ERROR NO. 2

That the Judgment and Commitment do not conform to the actual sentence of the District Court, which consists of the reporter's transcript of the proceedings of October 5, 1951, same being the actual judgment in the case and the Judgment and Commitment as reflected by the minutes of the Clerk dated October 5, 1951, which was the ministerial judgment entered upon the sentence previously imposed.

SPECIFICATION OF ERROR NO. 3

That the District Court erred in overruling defendant-appellant's motion to vacate sentence for the reason that the attempted cumulation of Count 3 with the other counts in the original indictment against appellant is ineffective and is not supported by the documentary evidence adduced at the hearing before the trial court.

SPECIFICATION OF ERROR NO. 1—(Restated)

That the Judgment and Sentence in the original Cause No. 12153, Criminal, in the District Court for the United States for the District of Nevada, will not support a cumulation of the sentences attempted to be imposed against defendant-appellant, because the sentences attempted to be

imposed were vague, uncertain and indefinite and did not provide for the proper sequence of serving and expressly provided in the judgment that said sentences were to run consecutive with one another.

STATEMENT

Appellant deems the Specification of Error as a sufficient statement of the point of law relied upon.

ARGUMENT AND AUTHORITIES

Judgments in criminal cases are the pronouncements from the bench and neither the commitment or the clerk's entry is the judgment. *Walden v. Hudspeth*, 115 F. 2d 558; *Bowie v. King*, 137 F. 2d 495; *Watkins v. Merry*, 106 F. 2d 360; *Wilson v. Bell*, 137 F. 2d 716; *Berman v. U. S.*, 302 U. S. 211.

Defendant's Exhibit No. 1 (R. 7) provides in substance as follows:

"So it is the judgment of the Court that the defendant is guilty of the offense charged in the 5th count of the indictment, which I think you understand is a rather long charge, covers matters that are set forth in the first count. You were here in court, of course, every moment of the trial, you know very well what the 5th count contains. It refers particularly to your depositing in the mail matters forwarded and addressed to Mrs. Gertrude Olness. You are adjudged guilty of that offense and you are, for that offense, committed to the custody of the Attorney General for the period of five years and fined in the sum of two thousand dollars. On the charge contained in the third count, you are adjudged guilty of that offense and you

are committed to the custody of the Attorney General for the period of three years and fined in the sum of one thousand dollars. On the charge contained in the 4th count of the indictment, you are adjudged to be guilty by virtue of the verdict of the jury, and you are hereby committed to the custody of the Attorney General for the period of three years and fined in the sum of one thousand dollars. By virtue of the verdict of the jury, you are adjudged guilty of the charge contained in the 8th count and for that charge in the count you are committed to the custody of the Attorney General for the period of three years and fined in the sum of one thousand dollars. The sentences imposed on Count 4 will be concurrent with that imposed on Count 5, so far as the imprisonment is concerned. The sentence imposed on Count 8 is concurrent with the sentence imposed on Count 5, insofar as the imprisonment is concerned. The total term of imprisonment is eight years. The total fine imposed is five thousand dollars. You are fined one thousand dollars on Count 3; you are fined two thousand dollars on Count 5; on Count 8 you are fined one thousand dollars; on Count 4 you are fined one thousand dollars. The sentence imposed on the third count is consecutive. So the defendant is remanded to the custody of the marshal."

An analysis of this sentence reveals the following chronological facts with reference to the sentence :

(1) On Count 5 of the indictment, 5 years, fined the sum of Two Thousand Dollars.

(2) On Count 3, 3 years and a fine in the amount of One Thousand Dollars.

(3) On Count 4, 3 years confinement and One Thousand Dollars Fine.

(4) On Count 8, 3 years confinement and One Thousand Dollars fine.

The Court then goes on to state, the sentences imposed on Count 4 be concurrent with that imposed on Count 5, so far as the imprisonment is concerned. The sentence imposed on Count 8 is concurrent with the sentence imposed on Count 5, insofar as the imprisonment is concerned. *The total term of imprisonment is eight years.*

At this point, the Court did not cumulate the sentence to arrive at the figure of eight years. In the next to last sentence of the Sentence imposed, we find the following: "The sentence imposed on the third count is consecutive."

It is apparent from a reading of the sentence that what the Court did was first assess a sentence on all four counts that could not possibly exceed 5 years, that being the term imposed on the Fifth count. Then the court made a computation of arithmetic with reference to the four preceding counts, arriving at the figure eight years, without any cumulation being mentioned at that point in the sentence. Then the Court went on to state that Count 4 would be concurrent with Count 5 and that Count 8 would be concurrent with Count 5 as to imprisonment and then the court again repeated that the total imprisonment was 8 years without specifying when the sentence was to begin, which count was to run first, etc. There can be no other conclusion but that the sentence and judgment as reflected by Defendant's Exhibit No. 1 set out above, is completely vague, indefinite and uncertain and could not impose a greater sentence than 5

years as imposed on Count 5 in the sentence. The Honorable Trial Court in its Opinion, Findings of Fact and Conclusions of Law (R. 32), poses a question as to which should control, the official transcript of the shorthand reporter's notes of the sentence imposed from the bench or the clerk's notes made at the time of the rendition of the sentence. It is submitted that the authorities set out above answer this question and it is not open to doubt that the official shorthand notes of what transpired in the courtroom should control over the clerk's recollection as to what transpired.

From the Court's Findings of Fact and Conclusions of Law (R. 32), the following:

"In Exhibit No. 3 herein, minutes of Court, among other things, we find the following:

"* * * IT IS FURTHER ORDERED that the prison sentence imposed on Count 4 will run *CONCURRENTLY* with the prison sentence imposed on Count 5; and that the prison sentence imposed on Count 8 will run *CONCURRENTLY* with the prison sentence imposed on Count 5; and that the sentence imposed on Count 3 *will run CONSECUTIVELY with the sentence imposed on Count 5*; the total prison sentence is 8 years and the total fine is \$5,000.00. * * *."

This quotation from the judgment itself, brings Appellant's case squarely within the rule announced by this court in *Bledsoe v. Johnson*, 154 F. 2d 458, 459 (9 C. C. A.), *Cert. Den.*, 66 Supreme Court, 1367, 328 U. S. 872, 90 L. Ed. 1642, wherein it was stated:

"The controversy is whether the sentences were to be served concurrently or consecutively. Each sentence

signed by the District Judge read that it is to run consecutively with the other. Obviously, here is no effective judgment for consecutive sentences."

The word "with" in the *Bledsoe* case is the same verbiage that is used in the Court's judgment in the above numbered cause. It is apparent from an examination of the Court's sentence in this cause and from an examination of the judgment entered in this cause that there is an ambiguity and uncertainty with reference to the intent to cumulate the punishment. It is unquestioned that there is no provision in the sentence as to when the cumulative punishment, if any, is to begin, and this is especially uncertain where the imprisonment on other counts was for different periods of time.

In *United States v. Patterson*, C. C., 29 F. 775, Mr. Justice Bradley of the Supreme Court, sitting in Circuit, considered a case in some respects similar. The accused had plead guilty to three indictments for three separate offenses, as had the present appellant. He was sentenced "for the term of five (5) years upon each of the three indictments * * * said terms not to run concurrently * * *." He served one term of five years, was continued in detention, and sought release through habeas corpus proceedings. Describing the questioned language of the sentences as equivalent to "the said terms shall follow each other successively," Mr. Justice Bradley nevertheless held the sentences to be for a total of only five years because the language referred to was "incapable of application to the respective terms,

without specifying the order of their succession * * *." The Justice explained:

"If they are successive, which one? That which is first to be executed, or that which is secondly or thirdly to be executed? No intelligence is sufficient to answer the question. A prisoner is entitled to know under what sentence he is imprisoned. The vague words in question furnish no means of knowing. They must be regarded as without effect, and as insufficient to alter the legal rule that each sentence is to commence at once, unless otherwise specially ordered.

* * * * *

"* * * As neither of them was made to take effect after the one or the others, they all took effect alike; that is, from the time of the rendering of judgment * * *."

Agreeing that a court has a right "to extend its judgment and proceedings on the record in proper form, regardless of imperfections in the minutes of its clerk," the Justice went on to say that in the case before him,

"there are no materials in existence for altering the form of the judgment under consideration—at least nothing but what may rest in the bosom of the judge; and for him to resort to his memory at this day to alter the judgment would be to render a new judgment."

United States v. Daugherty, 269 U. S. 360, 46 S. Ct. 156, 70 L. Ed. 309, involved sentences on three counts of the same indictment for five years on each count, to be *consecutive and not concurrent*. The Supreme Court implied the order of consecutiveness, saying:

"The judgment here questioned was sufficient to impose total imprisonment for 15 years, made up of three 5-year terms, one under the first count, one

under the second and one under the third, to be served consecutively and to follow each other in the same sequence as the counts appeared in the indictment. This is the reasonable and natural implication from the whole entry."

The Court distinguished Patterson on the ground that in Patterson the sentences grew out of "three separate indictments," saying, "the question there was materially different from the one here presented, which concerns counts in one indictment." (See Fed. Rules Criminal Procedure, Rule 13. Pleas to separate indictments no different than pleas to separate counts of same indictment.)

It seems, therefore, that under Patterson, thus distinguished but not disapproved, the sentences pronounced in open court in the present cases as "consecutive" without more, were satisfied when Count 5, the specified term had been served. F. R. C. P. Rule 13 was promulgated after *U. S. v. Daugherty*.

On the question of the uncertain sentence, the following cases are cited:

Holt v. Sanford, 101 F. 2d 290, 5 C. C. A., opinion by Judge Foster. In this case the appellant had pled guilty to two indictments in the Southern District of Mississippi, one indictment charging four counts of resisting a Federal Officer and the other indictment in four counts charging violations of the Federal Liquor Law. On indictment 4436, a sentence was imposed as follows: "It is therefore ordered, considered and adjudged by the Court that the said defendant be confined in the U. S. Penitentiary at Atlanta, Ga., for a period of 10 years from the date of delivery, whereupon proper process will issue." On indictment 4351 the following sentence was imposed: It is therefore

considered and adjudged by the Court that the said defendant be confined in the U. S. penitentiary at Atlanta, Ga., for a period of 5 years from the date of delivery whereupon proper process will issue. The sentence imposed in this case is to run continuously with the sentence imposed in Case No. 4436. The commitment or mittimus read in part that he was to be confined in the Federal Penitentiary at Atlanta, Ga., for a period of 15 years from the date of delivery, the mittimus being signed by the Clerk and not the Judge. The court stated "Sentence in a criminal case should be clear and definite construing the entire judgment imposed and the sentence must be considered rather than one particular word." U. S. v. Daugherty, 269 U. S. 360. If its meaning is doubtful the presumption arises that it is to be served concurrently with another sentence imposed at the same time. 15 American Jurisprudence, Section 465, Criminal Law. The word continuously may have different meanings according to the context of the writing in which it appears. So far as we have been able to ascertain as used in a sentence of imprisonment the word has not been judicially defined except by the District Court in this case. The trial court has authority to make the sentences run consecutively or concurrently. Those words are generally used to indicate the intention of the Court. A strong presumption may be indulged that the use of the word continuously in the case was a clerical error, committed by the Clerk, as its use is so unusual it is doubtful that it was intentionally used by the Judge. If the sentences had been silent as to whether they were to run consecutively or concurrently, they would have run concurrently from the date the prisoner was delivered to the penitentiary. 18 U. S. C. A., Section 709a. Both sentences clearly provide that the terms of imprisonment are to run from date of delivery to the penitentiary. They cannot be construed to run consecutively without violating that provision. Following the definitions relied upon by the District Court in con-

struing the word continuously to mean without interruption it would be a reasonable conclusion that it was the intention of the trial court that the sentence of four years should not be interrupted and postponed by the service of the sentence of ten years. While the commitment states the term of imprisonment to be 15 years, that is purely the act of the clerk. A commitment depends upon the validity of the judgment behind it. A mittimus is controlled by the judgment. *Hill v. Wampler*, 298 U. S. 460, case was reversed and remanded.

The judgment or sentence must be definite and clear. See *U. S. ex rel Chasteen v. Denmark*, 138 Fed. 2d 289 (7 C. C. A.) where the Court sought to make the sentence consecutive with the sentence imposed in No.....with no further designation as to the Court, offense, etc.

Biddle v. Hall, 15 Fed. 2d 840 (8 C. C. A.)—two indictments were plead to on the same day. Sentences were alleged to be imposed on the same day and that they should not be concurrent. Court held this insufficient and uncertain to render the sentences to be served consecutively. See also *Wagner v. U. S.*, 3 Fed. 2d 864 (9 C. C. A.)—a sentence of three months and a fine or a sentence of five months if fine not paid held uncertain and bad.

From *Millard v. U. S.*, 148 Fed. 2d 154, the following:

“We think though, that the provision of the sentence that the first term shall not commence until the imprisonment for nonpayment of the fine, has in some way come to an end as too indefinite and depends on too many contingencies to be valid and effective. It is true that by exact specification as to when each term shall begin, in appearance it conforms to the rule that where sentences are imposed on pleas of guilty on several counts of the same indictment in the same court, unless the sentences so imposed are to run concurrently, there must be some definite specific pro-

vision that the sentences shall run consecutively, specifying the order of the sequence. Citing *Howard v. U. S.* 75 Fed. 986 (6 C. C. A.), 34 L. R. A. 509; *U. S. v. Patterson*, C. C. 29 Fed. 775; *Boyd v. Archer*, 9 C. C. A., 42 Fed. 2d 43, 70 A. L. R. 1507; *Daugherty* 269 U. S. 360, 362; *Pacinelli v. U. S.*, 9th Circuit, 5 Fed. 2d, page 6."

SUMMARY

It is respectfully submitted that this Specification of Error No. 1, clearly reflects that the attempt to cumulate the sentence imposed upon Count 3 of the indictment was totally ineffective. Tested by all of the authorities cited above and construing the sentence in favor of the liberty of the accused and that no presumptions will be indulged in to sustain the sentence or judgment, The Honorable Trial Court was in error in not vacating the sentence and judgment as imposed upon Count 3 of the indictment and ordering the discharge of appellant from custody.

SPECIFICATION OF ERROR NO. 2—(Restated)

That the Judgment and Commitment do not conform to the actual sentence of the District Court, which consists of the reporter's transcript of the proceedings of October 5, 1951, same being the actual judgment in the case and the Judgment and Commitment as reflected by the minutes of the Clerk dated October 5, 1951, which was the ministerial judgment entered upon the sentence previously imposed.

STATEMENT

Appellant feels that the Specification of Error is sufficiently definite to explain Appellant's position in the matter.

ARGUMENT AND AUTHORITIES

Judgments in criminal cases are the pronouncements from the bench and neither the commitment or the clerk's entry is the judgment. *Walden v. Hudspeth*, 115 F. 2d 558; *Bowie v. King*, 137 F. 2d 495; *Watkins v. Merry*, 106 F. 2d 360; *Wilson v. Bell*, 137 F. 2d 716; *Berman v. U. S.*, 302 U. S. 211.

It has clearly been established that there is a variance between the actual judgment and sentence as reflected by the shorthand reporter's notes and the formal judgment which was later entered, based upon the minutes as taken by the clerk. Under all of the authorities cited, the pronouncement from the bench as reflected by the shorthand reporter's notes, is the judgment. In the absence of a correct formal judgment based upon the pronouncement from the bench, the Appellant is illegally restrained of his liberty and the restraint should be vacated by this Honorable Court.

Appellant recognizes that there is a remedy to correct a formal judgment, which is at variance with the judgment and sentence of the court as pronounced from the bench. See *Aderhold v. McCarthy*, 65 F. 2d 452 (5 C. C. A.); *Montgomery v. U. S.*, 165 F. 2d 196; *Former Appeal*, 134 F. 2d, page 1, describing the proper remedy for correction of uncertain sentence and providing for presence of the accused and taking of testimony. The rule in this Court of Appeals appears to have been laid down in *Bledsoe v. Johnson*, 154 F. 2d 458, that the sentence may be corrected only by record evidence and not by parole.

SUMMARY

It is apparent that should the Honorable Court hold that the pronouncement from the bench as reflected by the shorthand reporter's notes, constitutes a definite and sufficient judgment to cumulate the punishment in Count 3 of the indictment (which we question), then there is no proper formal judgment for the following reasons:

(1) The formal judgment, Exhibit 3, does not follow the pronouncement of Exhibit 1, the actual judgment and sentence.

(2) There being no formal judgment, Appellant is illegally restrained and the Motion to Vacate his sentence should have been granted.

(3) The only other action that could have been taken, which the trial court did not do, was to attempt to correct the formal judgment as entered.

The state of the record should thus entitle Appellant to have the sentence imposed against him on Count 3 vacated in the absence of a proper formal judgment.

SPECIFICATION OF ERROR NO. 3—(Restated)

That the District Court erred in overruling defendant-appellant's motion to vacate sentence for the reason that the attempted cumulation of Count 3 with the other counts in the original indictment against appellant is ineffective and is not supported by the documentary evidence adduced at the hearing before the trial court.

STATEMENT

Appellant's argument and authorities as set out under Specification of Error No. 1 is germane to this Specifica-

tion of Error and the attention of the Honorable Court is respectfully invited thereto.

CONCLUSION

It is respectfully submitted that Appellant-Petitioner has served his lawful sentences and is entitled to an order vacating the sentence on Count 3 in Cause No. 12153, and an order discharging him from further confinement at the Federal Correctional Institution, Seagoville, Texas. There being no valid judgment conforming to the sentence imposed in the above cause is a further basis for immediate discharge.

Respectfully submitted,

.....
CHARLES WILLIAM TESSMER,
1002 Fidelity Bldg.,
Dallas, Texas,
Attorney for Appellant.

CERTIFICATE

I, Charles William Tessmer, hereby certify that on this, the day of April, 1958, three copies of Appellant's Opening Brief were served upon the United States District Attorney for the District of Nevada, by mailing to his office at P. O. Box 1889, Las Vegas, Nevada, postage prepaid.

CHARLES WILLIAM TESSMER,
Attorney for Appellant.

APPENDIX A

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APPENDIX B

Title 28, U. S. C. A., Sec. 2255:

Federal custody; remedies on motion attacking sentence:

“A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

“A motion for such relief may be made at any time.

“Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial

or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate.

“A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

“The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

“An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

“An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967, amended May 24, 1949, c. 139, Sec. 114, 63 Stat. 105.”

No. 15,929

**United States Court of Appeals
For the Ninth Circuit**

JAMES HENRY AUDETT,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

**Appeal from the United States District Court for the
District of Idaho, Central Division.**

APPELLANT'S OPENING BRIEF.

THOMAS M. JENKINS,

LESLIE GENE MAC GOWAN,

593 Market Street,

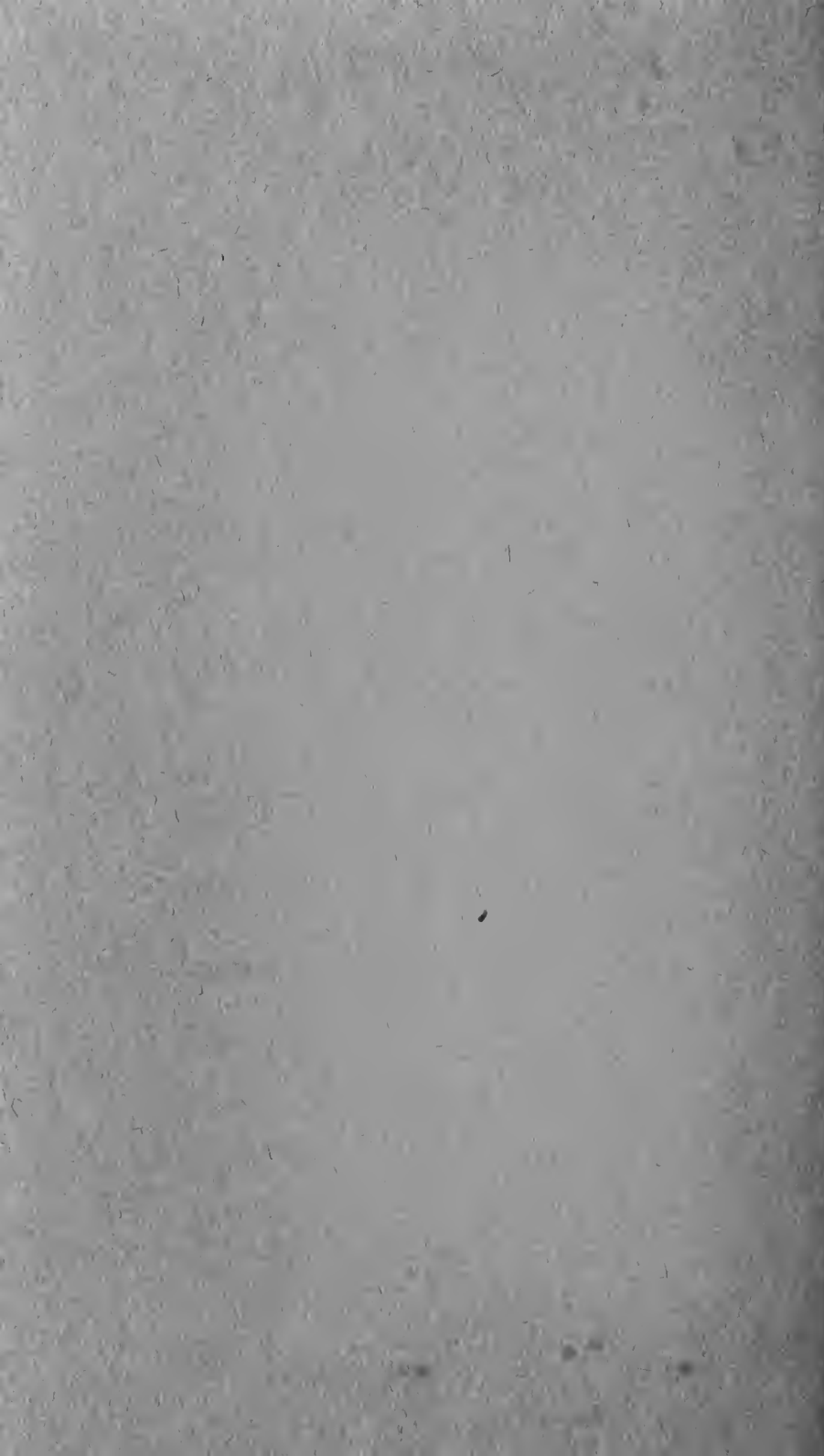
San Francisco 5, California,

Attorneys for Appellant.

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PAUL P. O'BRIEN, CLERK



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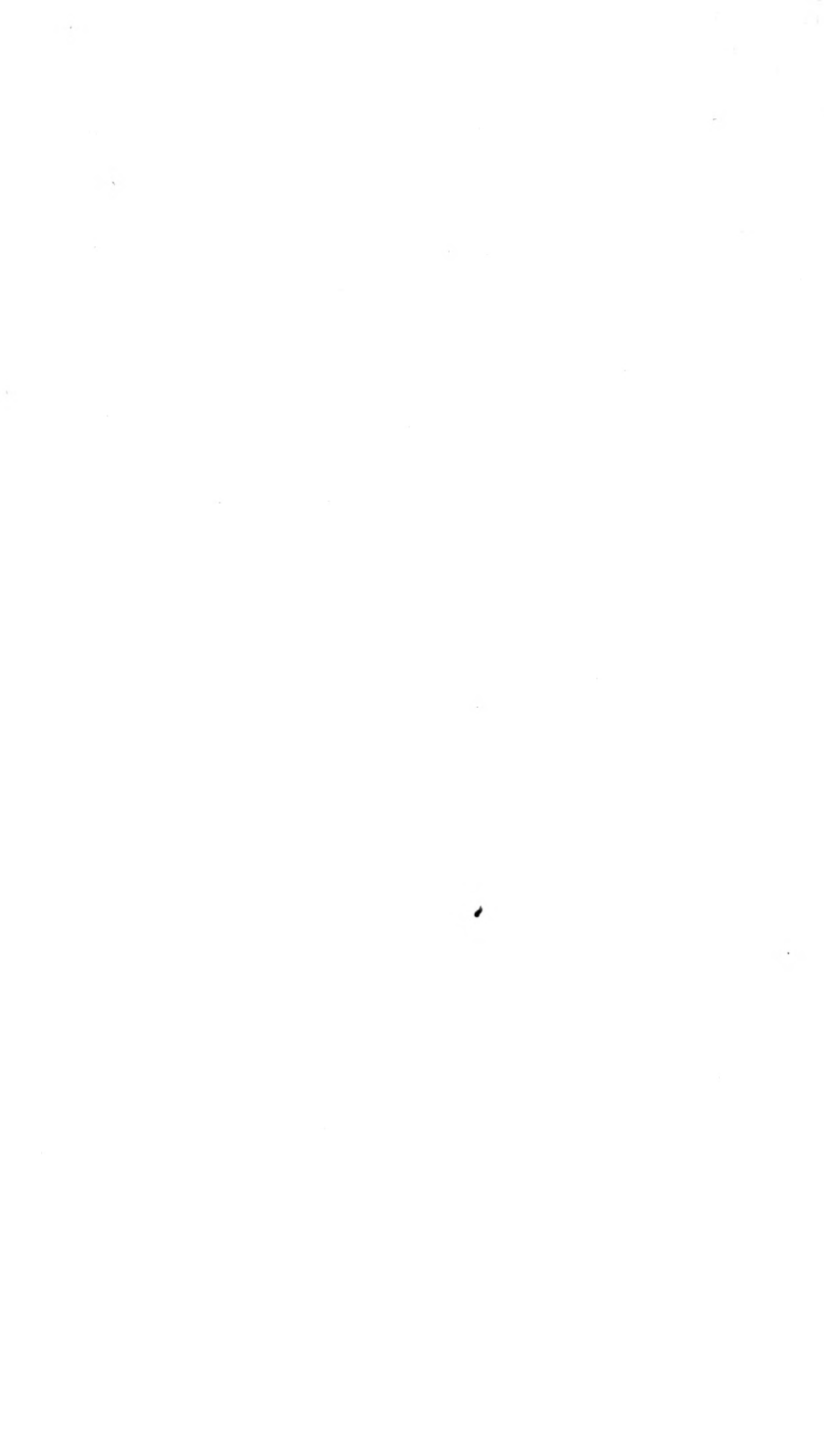
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No. 15,929

**United States Court of Appeals
For the Ninth Circuit**

JAMES HENRY AUDETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the United States District Court for the
District of Idaho, Central Division.**

APPELLANT'S OPENING BRIEF.

JURISDICTION.

This is an appeal from a judgment of conviction handed down by the United States District Court for the District of Idaho, Central Division.

STATEMENT OF CASE.

An indictment was returned in the United States District Court of Idaho on January 25, 1956, against appellant herein, James Henry Audett, alleging that he had committed a bank robbery at Cottonwood, Idaho, on October 29, 1953.

Audett was arrested in November 1953, along with others named McClure, Hall, and Johnson, approxi-

mately two weeks after the alleged bank robbery. Certain items reputedly taken from the bank were found in possession of McClure (e.g., gold dust, jewelry). Audette was sent to prison at Salem, Oregon, for associating with known felons. So far as is known, no charges were then placed against McClure, Johnson or Hall.

In 1955, McClure was convicted of theft of government property at Portland, Oregon, and sentenced to two and one-half years imprisonment. In the same year, Hall was sentenced for bank robbery in North Dakota (one year), and later a longer term (reportedly fifteen years) for burglary in Vancouver, Washington.

Audett was arrested after the indictment of January 25, 1956, at Portland, Oregon, taken to Idaho, remained in the Caldwell County Jail until March and then in the Lewiston Jail until April 2, when he was arraigned before the Honorable Chas. E. Clark, Judge, District Court of Idaho, with Dean E. Miller, Esquire, U. S. Commissioner for the District of Idaho, as his attorney.

Trial was held on April 9 and 10, 1956. Sole testimony as to the robbery, and purported activity of Audett in connection therewith, was by Hall and McClure, purported accomplices. No witnesses for the defense were introduced.

Audett was found guilty, sentenced to twenty years on one count, ten on the other (concurrent), and immediately flown to Alcatraz. Hall, who was brought

from Washington State Reformatory for the trial under an agreement that he would be immune from process and arrest while in Idaho (transcript page 19, lines 7-10), pled guilty to bank robbery and received a sentence of one hour in the custody of the marshal. McClure also pleaded guilty, and was sentenced to serve six months concurrent with theft sentence he was then serving.

Audett filed a notice of appeal, and an election not to serve pending appeal. The District Court of Idaho denied election not to serve (Tr. pp. 24-28) and also denied application to proceed *in forma pauperis* (Tr. pp. 31-32). This appeal is now before this Court. (The above facts are as reported by appellant, who is currently incarcerated at Alcatraz.)

SUMMARY OF ARGUMENT.

Appellant contends:

1. That he was not accorded a fair trial within the meaning of the due process clause of the Constitution of the United States, Amendment 5, in that a United States Commission for the District of Idaho was allowed by the Court to act as counsel for appellant.

2. That he was, in fact, denied the "right to counsel" guaranteed by the Sixth Amendment to the United States Constitution.

3. That he was convicted solely on the uncorroborated testimony of purported accomplices, after preju-

dicial error had been committed by the trial Court in its instructions relative to accomplices.

4. That there is insufficient evidence to support the judgment, and

5. That the Court committed prejudicial error in that it refused to grant the motion for judgment of acquittal.

ARGUMENT.

I.

APPELLANT WAS DENIED DUE PROCESS OF THE LAW IN BEING REPRESENTED BY A UNITED STATES COMMISSIONER.

The Fifth Amendment to the Constitution provides:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

The phrase “due process of law” has consistently been applied to assure that defendants in criminal cases be afforded all the rights to which they are entitled under the Constitution. For, as stated in *United States v. Hamilton*, 97 Fed. Supp. 123 at 128:

“The Bill of Rights secures liberties which are sacred and inviolable. An uncorrected transgression of its commands or prohibitions ought not be weighed and measured by the degree of force with which it may impinge upon a given situation. If the violation is clear, the remedy should be applied. Otherwise, the privileges and immunities secured by the Bill of Rights may be gradually eroded by the judicial improvisations that would inevitably flow from a system whereby the right is gauged according to the person involved or the circumstances of the particular case.”

This clause supplements the specific procedural guarantees enumerated in the Sixth Amendment (discussed in Section II hereof) for persons accused of crime.

The record is clear that appellant was deprived of due process here, in being represented by a United States Commissioner. The transcript of the record, pages 8 and 9, contains a letter sent by appellant's purported counsel, before the trial, to the prosecuting attorney, indicating the position of Mr. Miller as such Commissioner. Could Mr. Miller therefore represent Audett?

The provisions of Part III, Title 28, Chapters 41 et seq., U.S.C., make it abundantly clear that United States Commissioners are prohibited from engaging in the practice of law in any Court of the United States.

Section 607, Title 28, *United States Code*:

“An officer or employee of the Administrative Office shall not engage directly or indirectly in

the practice of law in any court of the United States.”

A United States Commissioner is an “officer or employee” of the Administrative Office of the United States Courts. Part III of Title 28 is entitled “*Court Officers and Employees.*”

While some distinction seems to be made between the officers and employees of the Administrative Office and the clerks and other clerical and administrative personnel of the Courts, it does not appear from reading Part III of Title 28 that such a distinction is intended (see, however, Section 955, Title 28 U.S.C.).

In Section 604, Title 28, U.S.C., the duties of the director are defined. Among these duties are:

“(1) Supervise all administrative matters . . .”
(28 U.S.C. 604 (a) (1))

“(2) Determine and pay necessary office expenses of courts, judges, and those court officials whose expenses are by law allowable, *and the lawful fees of United States Commissioners*”
(28 U.S.C. 604 (a) (6))

“(3) Purchase, exchange, transfer, distribute, and assign the custody of law books, equipment and supplies needed for the maintenance and operation of the courts and the Administrative Office *and the offices of the United States Commissioners*” (28 U.S.C. 604 (a) (9))

The duties of a United States Commissioner are such that no distinction should be drawn allowing the

Commissioner to practice law in a Court of the United States while clerks, deputy clerks, and their assistants (28 U.S.C. 955) and United States Marshals (28 U.S.C. 556) are prohibited from doing so. Commissioners, as officers of the United States Courts should not be allowed to practice in these Courts in an obviously incompatible capacity.

Appellant concedes that Part III of Title 28 contemplates that United States Commissioners may engage in the practice of law (28 U.S.C. 633, as amended August 13, 1954). It should be noted, however, that clerks, deputy clerks, their assistants, and United States Marshals are not prohibited from engaging in the practice of law in any Court other than a Court of the United States. It is submitted that Section 633 contemplates that the Commissioners may engage in practice in the state and local Courts.

The United States was prosecuting the appellant for the alleged commission of a crime against its laws. Should an agent or officer of the United States be allowed to defend the person his employer is prosecuting?

We respectfully submit that Congress intended to prohibit the practice of law by United States Commissioners in the Courts of the United States.

It will be contended that Audett "waived" his rights in this matter by his certification on the letter of March 27, 1956, and statement to that effect in open Court (Tr. p. 37). It is submitted that it is not within the power of an accused or his attorney to waive such rights.

II.

APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL
RIGHT TO ASSISTANCE OF COUNSEL.

The Sixth Amendment to the Constitution of the United States provides:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”

It should be noted initially that the phrase “Assistance of Counsel” is the only *capitalized* right included in the amendment (see Library of Congress Edition of Constitution, published per Senate Joint Resolution No. 69, June 17, 1947); a right which the framers of the Constitution considered paramount and necessary to our system of justice.

Through the years, the Supreme Court of the United States has progressively added substance to the right by requiring that the “Assistance of Counsel” be effective. *Glasser v. U.S.*, 315 U.S. 60; *United States ex rel. Mitchell v. Thompson*, 56 F. Supp. 683, 686-87.

Decisions of the Supreme Court on the effect of violation of the right to effective counsel have, in recent years, been precise in construing the guarantee,

to impose on the trial Court an absolute requirement that an accused be secured the elements of the right.

“The right to the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.”

Glasser v. U.S., 315 U.S. 60.

From the opinion above quoted, and those hereinafter cited, it would seem that to prove his contention of denial of his constitutional right to counsel, appellant need but to reiterate that

a. His attorney of record was in fact United States Commissioner, representing an irreconcilable conflicting interest, and

b. No defense on behalf of appellant was made by said attorney.

What does the record show with regard to these two points?

In Section I (supra) we have pointed out that Mr. Miller, the attorney of record, was also United States Commissioner. The same facts and authorities cited therein, indicating violation of due process, would apply as to the Sixth Amendment. For, as pointed out in a citation from *Johnson v. Zerbst*, 304 U.S. 458, the Supreme Court in *Glasser v. U.S.*, 315 U.S. 60, holds:

“Even as we have held that the right to the ‘Assistance of Counsel’ is so fundamental that the denial by a State Court of a reasonable time to allow the selection of counsel of one’s own choosing, and the failure of that Court to make an ef-

fective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to the denial of due process of law contrary to the Fourteenth Amendment *Powell v. Alabama*, 287 U.S. 45, so are we clear that the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and simultaneously represent conflicting interest. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired''.

The statements of the Supreme Court in *Johnson v. Zerbst*, supra, are pertinent, where at page 463 the Court says:

"The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. This is one of the safeguards of the Sixth Amendment, being necessary to insure fundamental human rights of life and liberty * * *

"The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done'

* * * The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights and that guaranty would be nullified by the determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution."

It might be contended that the *Glasser* case pertains only to circumstances wherein the defendant had

counsel appointed by the Court. This argument, however, was effectively quashed by the Ninth Circuit Court in the case of *Hayman v. U.S.*, 187 F.2d 456, where Denman, Chief Judge, avers at page 460:

“In the *Glasser* case, *supra*, unlike the present case, the trial judge appointed the attorney representing the adverse interests. However, the Sixth Amendment does not restrict the right to a deprivation by the judge * * * If, unknown to the court, the accused counsel were bribed by the enemy of the accused to throw his case, and the accused learned of it after conviction, the fact that the court had nothing to do with the wrong done, does not deprive him of his right to the writ.”

In the *Glasser*, *Johnson* and *Hayman* cases, *supra*, the Courts all found a violation of fundamental rights when an attorney represents conflicting interests.

What other comment can be made on the issue of conflicting interests?

The Court's attention is again called to the letter of March 27, 1956 addressed to the United States Attorney, District of Idaho (Tr. pp. 8 and 9).

Here we see an attorney who is theoretically going to represent an accused, actually asking the opinion of the prosecutor as to the ethics of his position. We see that there had been a discussion with the United States Attorney, as to whether Mr. Miller should resign as U.S. Commissioner. And obviously, agreement had been reached before the letter was written.

Can it honestly be contended by anyone that there was no major conflict of interest here?

As to our first point, then, it must be concluded that the law is clear; his attorney represented diametrically opposed and conflicting interests and appellant was thus denied "Assistance of Counsel".

The meaning of the words "right to counsel" has been extended by the Courts so that now the right includes that to have "effective" counsel. As stated by the Court in *United States v. Wights*, 176 F. 2d 376, which case involved an appeal from a denial of a motion to vacate sentence, where the petitioner had contended as here that he did not receive the effective services of counsel contemplated by the constitutional guaranties of the Fifth and Sixth Amendments, at page 378:

"There can be no quarrel with the proposition that the right to counsel means the right to the conscientious services of competent counsel. (Citing *Von Moltke v. Gillies*, 332 U. S. 708; *Willis v. Hunter*, 166 F.2d 721; *Power v. Alabama*, 287 U. S. 45; *Johnson v. Zerbst*, 304 U. S. 458; *Glasser v. U. S.*, 350 U.S. 60)".

Again, in *Hayman v. U. S.* (supra):

"It is erroneous to contend that the Court of Appeals for the District of Columbia holds that it is only where the court appoints his attorney that the accused may claim that he has not enjoyed the effective assistance of counsel. On the contrary in *Jones v. Huff*, 80 U. S. App., D.C. 254, that court reversed the dismissal of an application for a writ of habeas corpus which al-

leged that the attorney chosen by the convicted man had so conducted the trial that it became 'a farce and a mockery of justice'. It was held that the accused was not given the effective representation required for the fair trial of the Fifth Amendment within the broad principles established in the Glasser case and in Mr. Justice Frankler's opinion in *Malinski v. People of the State of New York*, 324 U. S. 41''.

It is easy, of course, for subsequent counsel in the ordinary case to frame better questions; for military strategists to demonstrate how lost battles might have been won. But such is not the need here.

A page by page, witness by witness perusal of the record will show, without question, that there simply was *no* representation. We have here an attempt to convict a man on the uncorroborated testimony of purported accomplices. Is there any pattern at all to the questions of counsel? Is there any attempt to bring out and emphasize conflicting testimony?

Is there a searching cross-examination of the young convicts who are testifying (one under an agreement, which must have been known to counsel as it was a matter of record, that he would not be subject to process or arrest) against appellant? Is there any positive approach pointing out the inherent improbabilities in the so-called accomplices' testimony?

And finally, was any defense made? Were any witnesses for defendant examined? The record shows that immediately after the Government rested (p. 131), Mr. Miller did the same. Yet appellant states

that he repeatedly asked Mr. Miller to subpoena certain witnesses who could testify as to appellant's whereabouts on the day of the alleged bank robbery. (This is outside the record.)

This last failure, by itself, it is submitted, would be sufficient indication of the ineffectiveness of counsel. When tied to the rest of the record, little more need be said. For as this Court has pointed out in *Dusseldorf v. Teets, Warden*, No. 13,337, June 30, 1953 (later withdrawn for technical reasons):

"At the trial his attorney did not put one witness on the stand for Dusseldorf and he did not even let Dusseldorf take the stand . . . his attorney . . . replied he would not let Dusseldorf take the stand even after Dusseldorf told him his confession was false and could be proved false and that a co-defendant's confession was also false so far as it related to Dusseldorf. The result was no evidence at all was presented by his attorney in Dusseldorf's defense." (page 2.)

And at page 5 the Court repeats a statement made in a California Supreme Court hearing:

"Again this lack of counsel or representation by counsel so inadequate as to amount to no counsel at all (*Powell v. Alabama*, 387 U.S. 45) are not matters dehors the record. Lack of counsel would be apparent to the most casual observer thumbing through the record."

"We hold that these facts present a justiciable question of a violation of the due process clause of the Fourteenth Amendment respecting the performance of the court's obligation to make a

full inquiry as to Dusseldorf's representation at the trial by a counsel of his choice within *Glasser v. United States*, 315 U.S. 60; *Johnson v. Zerbst*, 304 U.S. 458." (page 4.)

The facts herein are extraordinarily similar to those of the *Dusseldorf* case. Audett is a man who is of Umatilla Indian background, with little formal education; his counsel a United States Commissioner. No witnesses for the defense were presented. Appellant was not placed on the stand. Cross-examination was missing, minute or mutilated with no pattern or form. Even "the most casual observer thumbing through the record" can see that there was a lack of effective assistance of counsel such as to make the trial a sham and mockery of justice.

And what additional indications are there of both a conflict of interest, and failure to act as effective counsel? A notice of appeal was filed by Mr. Miller on April 18, 1956. The appellant was taken to Alcatraz immediately after the trial. He sought, by letter to the clerk (Tr. p. 22) to elect not to serve pending appeal. Counsel did not appear for him on such motion. Nor did counsel make any attempt to proceed with his appeal. For within five days (and it must be assumed without personal discussion, for appellant was in Alcatraz), Mr. Miller on April 23 filed notice of withdrawal as attorney for Audett.

The Constitutional safeguard of "assistance of counsel" would indeed, as previously pointed out in *U. S. v. Hamilton*, supra, be "eroded away", if the conflicts here shown were allowed to stand unchallenged.

III.

**THE COURT COMMITTED PREJUDICIAL ERROR IN DENYING
DEFENDANT'S MOTION FOR ACQUITTAL.**

At the close of the prosecution's case defendant's counsel moved the Court for a judgment of acquittal on the ground that the defendant should not be convicted solely upon the uncorroborated testimony of the accomplices (132).^{*} The motion was denied (132). It is appellant's contention that the Court's denial of the motion for acquittal was erroneous.

A. Appellant was convicted on the uncorroborated testimony of alleged accomplices.

Witnesses Hall and McClure, by their own admissions, committed the burglary of the First National Bank of Cottonwood, Cottonwood, Idaho. They were both indicted, they both pleaded guilty, they were both convicted, and they were both waiting to be sentenced at the time that they testified in *U.S. v. Audett* (59, 90). Both witnesses testified that Audett conceived the plan of the burglary, solicited them to accompany him, and directed them in the accomplishment of the crime. But for the testimony of Hall and McClure, there was no other evidence to connect Audett to the crime.

It is naive to suppose that Hall and McClure did not have some assurance that their testimony against Audett would reduce the sentences which they would receive after Audett's trial. (And the facts as reported by appellant would bear this out. Hall received one

^{*}References are to pages of the printed Transcript of Record.

hour in custody of the Marshal; McClure six months, concurrent with another sentence.)

The federal rule has been that a man may be convicted on the uncorroborated testimony of an accomplice. This has been the rule of law in Federal Courts in spite of the recognition in nearly every case how untrustworthy such testimony is.

Many states, recognizing the fact which is stated in nearly every case on the subject, federal or state, that such testimony is peculiarly unreliable, have passed statutes which provide that a man may not be convicted of a crime on the uncorroborated testimony of an accomplice.

Alabama:

Alabama Code, 1940, Tit. 15, Sec. 307.

Arizona:

Arizona Code Ann., 1939, Sec. 44-1819.

Arkansas:

Arkansas Stats. Ann., 1947, Sec. 43-2116.

California:

California Penal Code, Sec. 1111.

Georgia:

Georgia Code, Sec. 38-121.

Idaho:

Idaho Code, Sec. 18-601.

Iowa:

Iowa Code Ann., Sec. 782.5.

Kentucky:

Kentucky Code of Crim. Proc., Sec. 241.

Minnesota:

Minnesota Stats. Ann., Sec. 634.04.

Montana:

Montana Pen. Code, 1935, Sec. 11988.

New York:

New York Code of Crim. Proc., Sec. 399.

Nevada:

Nevada Comp. Laws 4330.

Oklahoma:

Oklahoma Stats., 1941, Sec. 22-742.

Oregon:

Oregon Code, 1930, Sec. 13-935.

South Dakota:

South Dakota Code, 24.0204.

Texas:

Texas Code of Crim. Proc., 1925, Art. 718.

Utah:

Utah Code, 1943, 103-11-1.

Some states, *even in the absence of statute*, have refused to allow convictions on the uncorroborated testimony of an alleged accomplice.

Coleman v. State (Md.), 121 Atl. 2d 254;

Witham v. State (Tenn.), 232 So.W. 2d 3.

The reason for the rule is well expressed in

Watson v. State, 117 Atl. 2d 549, 552:

“It is a firmly established rule in this State that a person accused of a crime may not be convicted on the uncorroborated testimony of an accomplice. (Citations.) The reason for the rule

requiring the testimony of an accomplice to be corroborated is that it is the testimony of a person admittedly contaminated with guilt, who admits his participation in the crime for which he particularly blames the defendant, and it should be regarded with great suspicion and caution, because otherwise the life or liberty of an innocent person might be taken away by a witness who makes the accusation either to gratify his malice or to shield himself from punishment, or in the hope of receiving clemency by turning State's evidence. (Citations.)"

The United States Constitution guarantees a fair trial to a man accused of crime. A fair trial cannot be one where a criminal, who can expect to gain a lighter sentence or immunity if he names another as co-conspirator, is permitted to convict a man by his testimony alone. Without the requirement of corroboration there can be no protection for the innocent man from criminals who need a scapegoat. Even an honest and upright man succumbs occasionally to the temptation to sacrifice another to help himself. There is no justice in a rule of law which offers a criminal freedom or a reduced sentence in exchange for merely a little perjury.

B. The testimony of the alleged accomplices supports appellant's theory that Hall and McClure falsely implicated appellant in order to obtain light sentences for themselves.

The witnesses Hall and McClure agree very closely about how the crime was committed—they should, admittedly they did it—but when each tells how Audett participated, their stories are inconsistent.

Briefly, the crime was committed by driving from Portland to Cottonwood in McClure's car, parking the car a few blocks from the bank on a dark street, Hall climbing on top of the bank, breaking into the skylight, letting himself through the skylight with a rope, opening a door to let in his accomplice with the burglary tools (allegedly two accomplices), the criminals cutting through the top of the vault, rifling the safety deposit boxes, leaving through the outside door and making a getaway.

The following is the account of Audett's participation in the crime according to the testimony of Hall and McClure:

The first meeting of Hall, McClure and Audett:

Hall	McClure
They went to Audett's house and all three drove around in a car for a couple hours and discussed burglaries (42, 62).	They met at the Triple X Restaurant on 82nd Avenue (107).

The breaking through the skylight of the bank:

Hall	McClure
He and McClure got on the roof of the bank while Audett waited on the ground by some old machinery; they broke the skylight and Hall let himself down on a rope, McClure holding his hand (47, 48).	Hall broke into the skylight while McClure waited with Audett on the ground (92).

The breaking into the vault:

Hall	McClure
McClure and Audett took the bricks out of the top of the vault and Audett and McClure went into the vault first (50).	Hall and McClure took the bricks out of the top of the vault. Audett and Hall were first into vault while McClure was a lookout (93).

Audett is pictured by both as standing in the background, giving advice and directions. Any physical activity in the burglary attributed to Audett by the witnesses makes them tell conflicting stories. The physical activity in burglarizing the bank required only two people, not three. Having accomplished the crime and been apprehended several weeks later with the identifiable loot (although not indicted for over two years), it was easy to bring in another fictitious accomplice who has all the ideas, who stands in the background, but who never does any of the physical acts essential to accomplish the crime. Although this fictitious accomplice brought his tools, they weren't used in the crime [McClure identified Exhibits 2, 5, 10, 8 and 1 as his tools (88, 29); Hall identified the tools which had been purchased by him and testified evasively that Exhibits 5, 8 and 10 looked like tools which Audett had brought (57-58)]. This fictitious accomplice, for some reason unexplained, received his one-third share of the non-identifiable, fungible loot but did not receive any of the loot which was traced to the burglary (e.g. the jewelry, the gold dust and gold nuggets in little glass vials) and which was found in the possession of Hall and McClure (87).

IV.

APPELLANT WAS DENIED A FAIR TRIAL IN THAT:

- A. THE COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY THAT IT COULD CONVICT THE DEFENDANT ON THE TESTIMONY OF ACCOMPLICES ALONE (139).
- B. THERE IS NOT SUFFICIENT EVIDENCE TO SUSTAIN THE JUDGMENT WITHOUT THE UNCORROBORATED TESTIMONY OF THE ACCOMPLICES.

For reasons above stated (Section III) the constitutional requirement of a fair trial demands that the conviction be reversed on the ground that a man cannot be convicted of a crime solely upon the uncorroborated testimony of accomplices. This is a classic case of such conviction, for there is no evidence of any kind to connect appellant with the crime herein except the unsupported and uncorroborated testimony of purported accomplices.

It is respectfully submitted that the judgment herein should be reversed.

Dated, San Francisco, California,
November 26, 1958.

THOMAS M. JENKINS,
LESLIE GENE MAC GOWAN,
Attorneys for Appellant.

No. 15929

In the United States
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For the Ninth Circuit

JAMES HENRY AUDETT, Appellant,

vs.

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BRIEF FOR THE UNITED STATES

BEN PETERSON
United States Attorney

R. M. WHITTIER
Assistant United States
Attorney

FILED

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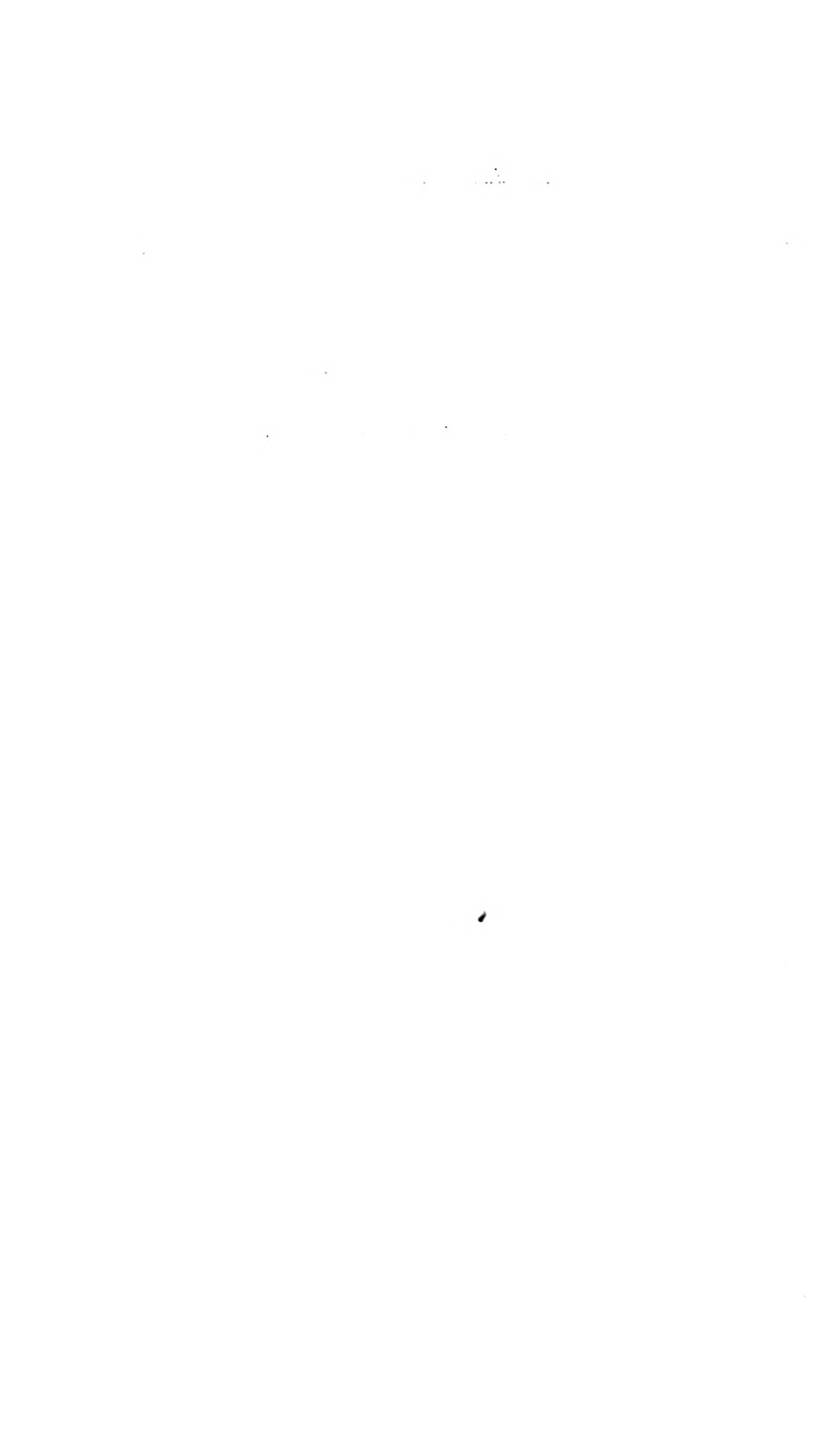
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OPINION BELOW

The judgment of the District Court was rendered without an opinion.

JURISDICTION

On January 25, 1956, a two count indictment was rendered against the appellant in the United States District Court for the District of Idaho, charging in the first count that on or about October 29, 1953 James Henry Audett attempted to enter and entered the First National Bank of Cottonwood, Cottonwood, Idaho, deposits of which at said time were insured by the Federal Deposit Insurance Corporation, with the intent to commit in such bank the crime of larceny, in violation of the provisions of 18 U.S.C., Section 2113. Count II of the indictment charged that on or about the 29th day of October, 1953, in the District of Idaho, Central Division, James Henry Audett took and carried away from the First National Bank of Cottonwood, Cottonwood, Idaho, the deposits of the said bank in the amount of \$30,000.00, which was in the care, custody, control, management, and possession of the said bank, and that at said time and place the deposits of said bank were insured by the Federal Deposit Insurance Corporation, in violation of 18 USC 2113. (R. 3-4)¹ Jurisdiction was conferred on the District Court by 18 U.S.C., Section 3231. After a jury trial, appellant was found guilty as charged. (R. 14) He was sentenced to imprisonment for twenty years on Count 1 and ten years on Count II, sentences to run concurrently. Sentence was imposed and judgment entered

¹/References preceded by "R" are to the Transcript of Record; references preceded by "Tr." are to the Transcript of proceedings upon trial; references preceded by "Br." are to the Appellants brief.

on the 10th day of April, 1956. (R.14-15) Notice of Appeal was filed on April 18, 1956 by his attorney, Frank E. Meek, (R. 20-21) and by the defendant himself in a written letter to the Court on April 21, 1956. (R. 21-22) The jurisdiction of this court is invoked under 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether appellant was deprived of a fair trial within the meaning of the due process clause of the United States Constitution, Amendment 5, as a result of one of his counsel being a United States Commissioner for the District of Idaho.

2. Whether the appellant's conviction was obtained in violation of his rights under the Constitution, Article 6, for the reason that counsel who appeared for him failed to present any defense whatsoever.

3. Whether there was sufficient evidence to sustain the judgment on Counts I and II, or either of them.

4. Whether the court committed prejudicial error in refusing to grant the motion for judgment of acquittal.

5. Whether the trial court committed prejudicial error in its instructions to the jury on the subject of testimony of alleged accomplices.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States:

Fifth Amendment

No person shall be held to answer for a capi-

tal, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C., Sec. 2113. *Bank Robbery and Incidental Crimes (portion applicable to this charge)*

* * * * *

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or

such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both;

* * * * *

Federal Rules of Criminal Procedure

Rule 52 — Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Appellant's statement of the case (Br. 1-3) is inadequate and incomplete and in many respects contains statements of fact not appearing in the record. Accordingly, the Government submits the following summary of the evidence and record.

The first count of the indictment charging the defendant with attempting to enter and entering the First National Bank of Cottonwood, Cottonwood, Idaho, alleges that on or about the 29th day of Oct-

ober, 1953, the defendant, James Henry Audett, in the District of Idaho, Central Division, attempted to enter and did enter the First National Bank of Cottonwood, Cottonwood, Idaho, the deposits of which bank were at said time insured by the Federal Deposit Insurance Corporation, with intent to commit in such bank the crime of larceny. The second count of the indictment charged that on or about the 29th day of October, 1953, in the District of Idaho, Central Division, James Henry Audett took and carried away from the First National Bank of Cottonwood, Cottonwood, Idaho, the deposits of which bank were at said time insured by the Federal Deposit Insurance Corporation, money, property, and things of value, the total value of which was \$30,000.00.

During all proceedings herein, James Henry Audett was represented by Frank Meek, attorney at law, Caldwell, Idaho, and was assisted by his partner, Dean E. Miller. At the time of the trial, Dean E. Miller was a United States Commissioner, residing at Caldwell, Idaho. (R. 8-9, Tr. 36-37) James Henry Audett knew this and in writing waived any objections he had thereto. The written waiver read in words and figures as follows:

“I, James Henry Audett, hereby certify that I have read the above and foregoing letter, that I have been fully advised that Dean E. Miller is a United States Commissioner, and hereby expressly waive any objection that I might have to his being such in the matter of being one of my attorneys in the above referred to matter.

/s/ James Henry Audett”

Thereafter, the defendant in open court was advised

by the Honorable Chase A. Clark, District Judge, as follows:

"The Court: Before we continue to select a jury for this case, I have a matter to take up here. The Defendant being present, it has come to the attention of the Court that it might be well to see if the Defendant is fully advised that Mr. Miller, who is of counsel for the Defendant, is a Commissioner, —a United States Commissioner for the District of Idaho. You are, of course, aware of that?

The Defendant: Yes, sir.

The Court: And you, Mr. District Attorney, are aware of that?

Mr. Furey: Yes, Your Honor.

The Court: Do you waive any question as to his appearing here as counsel for you, Mr. Audett?

The Defendant: Yes, sir." (Tr. 36-37)

All papers filed for and in behalf of the defendant were signed in person and/or by Frank Meek, his attorney. (R. 9, 21, 22, 23, 24) The defendant plead not guilty to each count of the indictment. A jury trial was had, beginning on the 9th day of April, 1956, at 10 o'clock a.m., and on April 10, 1956 a verdict of guilty was rendered on each count.

SUMMARY OF EVIDENCE

The evidence to support the verdict may be summarized briefly as follows:

James Henry Audett and Donald Duane Hall, in the latter part of September, 1953, met at Portland, Oregon. (Tr. 40) During this meeting the defendant inquired of Donald Duane Hall as to how he was do-

ing and if he was making any money and if he was hard up for money, to which Mr. Hall, a twenty year old youth responded to the affirmative. Mr. Hall was then asked by the defendant if he wanted to burglarize a bank, and on the first occasion declined the offer. (Tr. 40-41) Approximately two weeks later, Walter Clyde McClure and Hall drove over to Audett's place and talked to Audett, and discussed bank burglaries with him. At that time McClure and Hall advised Audett that they would accept Audett's proposition on bank burglaries and would go with him. Audett then asked Hall and McClure to pick up some burglary tools (Tr. 42-43), which Mr. Hall admits that he did. The three of them drove up the Washington side of the Columbia River into Spokane and on to Colton, Washington, and attempted to burglarize a bank there, but were unsuccessful. (Tr. 45, 94) The three of them stayed in Lewiston, Idaho that night under assumed and fictitious names. The next morning they drove to Cottonwood, Idaho and looked at several places on the way. After looking over the Cottonwood bank, they drove on to Arco, Idaho, and on the 28th day of October, 1953 returned to Cottonwood, and cased the bank. (Tr. 94) After darkness had settled over the area, they entered the Cottonwood bank, in accordance with a plan originated by Audett, by breaking a skylight and lowering a rope coil through the opening and having Mr. Hall slide down the rope. Mr. Hall then opened the door to the rear alley in order that McClure and Audett could enter. (Tr. 46-49, 92) After gaining entry to the building, the appellant supervised the removal of the bricks from the safe in order to gain entry thereto. After the bricks were remov-

ed, Audett, followed by McClure, entered the vault containing the bank deposits and returned with a little "leather secretary" filled with money removed from safe deposit boxes. (Tr. 50-51, 93) In addition thereto, certain silver and gold coins, together with gold dust, were removed and taken by these three subjects, the total value of the property taken being the sum of \$30,000.00. After the parties left the scene of the burglary this money and property was divided evenly among the three aforementioned persons. (Tr. 55, 91, 103) After the burglary was complete, these three subjects left the building through the back door, leaving the tools and rope on the inside where the burglary had occurred. (Tr. 52, 95) All of the defendants were arrested at a later date at Portland, Oregon, and part of the stolen money and property was recovered. Charges were filed against these three charging violation of the bank burglary statute. Donald Duane Hall and Walter Clyde McClure plead guilty to the charge. (Tr. 59, 90) The appellant pleaded not guilty and the trial aforementioned was had. (R. 10) Both Donald Duane Hall and Walter Clyde McClure were called as Government witnesses and testified to the facts hereinbefore set forth and, in addition thereto, the Government called the following witnesses:

W. W. Flint — President of the First National Bank of Cottonwood, Cottonwood, Idaho (Tr. 109-126)

Joseph Kuder — Town Marshal of Colton, Washington (Tr. 130-131)

Edward Mayer — Federal Bureau of Investigation, Lewiston, Idaho (Tr. 117-125)

Frederick Francis Thimmesch — Night Clerk,

Raymond Hotel, Lewiston, Idaho. (Tr. 126-130)

The defendant did not call witnesses in his behalf.

ARGUMENT

I

The Appellant Was Not Deprived of a Fair Trial Within the Meaning of the Due Process Clause of the United States Constiution as a Result of One of His Counsel Being a United States Commissioner.

The Fifth and Sixth Amendments of the Constitution which are set out at length in appellant's brief were enacted for the purpose of protecting persons charged with crimes, affording protection to the accused from being compelled to make self incriminating statements, and to guarantee his right to counsel. Certainly no violation of the Fifth Amendment can be shown, and the court went to extraordinary lengths to give the protection provided for in the Sixth Amendment of the Constitution. The court will note the contents of the letter which was signed by the appellant himself and by Frank E. Meek, attorney at Law, who was representing the defendant, which was submitted to the Office of the United States Attorney and filed with the court prior to the date of the trial. For purposes of reference, this letter is set out and reads as follows:

"Dear Sir:

"As you know, I discussed recently with you the fact that my partner, Dean E. Miller, is a duly appointed, qualified and acting United State Commissioner, my purpose being to ascertain whether in your opinion it would be ne-

cessary for him to resign as such because of this firm's employment by James Henry Audett to represent him in his defense against the indictment filed against him, and upon which he is to be arraigned on April 2nd, in the Federal Court Room at Moscow, Idaho.

"I also informally discussed this matter with Judge Clark.

"This is to advise you that our client, James Henry Audett, has been fully advised of this matter and of the fact that Mr. Miller is a United States Commissioner, and as a matter of fact, will be asked to read this letter before it is mailed to you, and to endorse thereon his waiver of any objection he might have to the fact Dean is a United States Commissioner.

"He is further being advised that at the time of his arraignment he should make an oral waiver of any objection he might have in the matter.

Yours very truly ,

MEEK & MILLER

/s/ By FRANK E. MEEK
FRANK E. MEEK

FEM:1r

WAIVER

I, James Henry Audett, hereby certify that I have read the above and foregoing letter, that I have been fully advised that Dean E. Miller is a United States Commissioner, and hereby expressly waive any objection that I might have to his being such in the matter of being one of my attorneys in the above referred to matter.

/s/ JAMES HENRY AUDETT" (R. 8-9)

It will be noted that not only had Mr. Meek consulted with the court and the United States Attorney but he obtained written consent from the defendant that Mr. Miller appear as one of counsel in such action. It should be further noted by the court that no allegation is made on the part of the appellant that Mr. Miller had performed any official functions on behalf of the United States in this particular case, but the said appellant is trying by innuendo to accuse counsel, Dean E. Miller, of a violation of the code of ethics and a violation of moral responsibility, merely because he had the power to act through an appointment by the court on matters within his jurisdiction. He challenges the moral integrity of Mr. Miller, stating that Mr. Miller could not be honest because he was an employee of the United States Government in a limited capacity. The court will note that the entire proceedings was under the supervision of Frank E. Meek, attorney for the appellant, and that Mr. Meek signed all papers and pleadings filed with the court on behalf of the appellant in this action, and there is a very definite attempt on the part of the appellant in his brief, which is filed with the court, to attribute all acts and results that counsel obtained on his behalf to be the responsibility of Mr. Miller alone. The Government feels that if Mr. Audett had any objection to Mr. Miller's conduct at the trial, that some mention of such fact should have been made before the completion of the trial or before the verdict was rendered, rather than proceed to take his chances on the outcome of the trial and, because the verdict was adverse, complain that his counsel conducted themselves in such a manner as to in fact amount to no representation at all.

As stated in the case of *Merritt v. Hunter*, 170 F.2d 739, 741:

"One accused who appears before the court with counsel employed for his defense is not deprived of his constitutional right to the assistance of counsel merely because in retrospection he concludes that such representation did not meet his standards of effectiveness."

No other conclusion can be reached other than that the defendant is using the "sour grapes" approach to this particular question of representation.

The court was put in a very difficult situation because one of counsel chosen by the defendant was a United States Commissioner. The trial court, however, fully advised the defendant and protected his rights in the trial as is reflected by the following excerpts from the record:

"The Court: Before we continue to select a jury for this case, I have a matter to take up here. The Defendant being present, it has come to the attention of the Court that it might be well to see if the Defendant is fully advised that Mr. Miller, who is of counsel for the Defendant, is a Commissioner, —a United States Commissioner for the District of Idaho. You are, of course, aware of that?

The Defendant: Yes, sir.

The Court: And you, Mr. District Attorney, are aware of that?

Mr. Furey: Yes, Your Honor.

The Court: Do you waive any question as to his appearing here as counsel for you, Mr. Audett?

The Defendant: Yes, sir." (Tr. 36-37)

The court was familiar with the constitutional guarantees of the Fifth and Sixth Amendments and was also familiar with the rule:

“The right to the assistance of counsel, granted by the Sixth Amendment, includes the right to counsel of defendant’s choosing.”

—11 Cyc. Fed. Proc., Sec. 39.77, p. 57;
United States v. Bergamo, 154 F.2d 31,34.

This rule is further explained in the case of *Glasser v. United States*, 315 U.S. 60, 71:

“Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. Speaking of the obligation of the trial court to preserve the right to jury trial for an accused, Mr. Justice Sutherland said that such duty ‘is not to be discharged as a matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.’ *Patton v. United States*, 281 U.S. 276, 312-313. The trial court should protect the right of an accused to have the assistance of counsel. ‘This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear

upon the record.' *Johnson v. Zerbst*, 304 U.S. 458, 465."

One represented by counsel is not denied due process of law, merely because the court permits the defendant to acquire counsel of his own choosing, when the choice is intelligently made. It is respectfully submitted that the appellant in this instance was fully advised as to his constitutional rights to counsel and was advised of the full facts leading up to the employment of Mr. Frank E. Meek and Mr. Dean E. Miller. It might be further noted by the court that this very defendant has had prior experience in the defense of similar matters in prior cases. See *Audett v. United States* 132 F.2d 528. This case involved the same appellant appealing from a conviction on a similar charge. It cannot be said that Mr. Audett was so unfamiliar with the proceedings in the United States District Court that he could not intelligently employ counsel. It might be noted further from the record that Mr. Audett is so well versed in the life of a criminal and the proceedings to which a criminal is subjected to that he wrote a book entitled "Rap Sheet", which was reputed to be a good seller. (R. 32, Tr. 89.)

Counsel for appellant in the brief refers at length to Title 28 U.S.C., Sections 604 and 607. It is respectfully submitted that such sections have nothing to do with the Office of the United States Commissioner or its duties or functions, since the court is well aware of the fact that the Administrative Office of the United States Courts is an entity separate and apart from the office of the Court itself. The United States Commissioner is an officer of the court and his duties are governed under the provisions of

Chapter 43, Title 28, Sections 631 to 639. Title 28, Section 631 (b) contains the only limitations found, other than administrative regulations, governing the conduct of the United States Commissioners. Subsection (b) reads as follows:

“A person holding any civil or military office or employment under the United States or who is employed by any justice or judge of the United States, shall not at the same time hold the office of United States Commissioner. This subsection shall not apply to a part-time referee in bankruptcy nor shall it apply to a clerk or deputy clerk of a court of the United States whose appointment as commissioner is approved by the Director of the Administrative Office of the United States Courts, but the Director may fix the aggregate amount of compensation to be received for performing the duties of commissioner and clerk or deputy clerk.”

There are no limitations other than the ethical arguments on the outside functions of the United States Commissioners, other than those stated in Subsection (b). Assuming *arguendo* that the defense of an accused made by a United States Commissioner in a United States District Court is not to be desired, we feel that the facts of this case do not warrant reversal upon that particular point, in light of the protective measures taken by the court to assure itself that the defendant made his decision intelligently and understandingly, and in light of the fact that Frank E. Meek was his chief attorney, and that Mr. Miller merely assisted in the defense of the matter. It is the Government's position that if any error was committed by reason of the fact that Mr. Miller was per-

mitted to participate in the defense of this matter it was harmless error, which error, defect, and irregularity did not affect the substantial rights of the defendant. See Rule 52, Federal Rules of Criminal Procedure.

This case is to be distinguished from the case cited in appellant's brief of *United States v. Hamilton*, 97 Fed. Supp., 123, 128, since the Hamilton decision was based upon an alleged irregular comment by Government counsel in his closing argument to the jury, and the question therein resolved was whether the appellant's constitutional guarantee against the right of self-incrimination was violated. It had nothing to do with the employment or conduct of defendant's counsel. The appellant has not raised any question pertaining to a violation of this right in his trial.

II

The Appellant Was Not Deprived of his Rights to Effective Assistance of Counsel in Violation of His Rights Under Article 6 of the United States Constitution.

Appellant argues throughout his brief that he was deprived of his constitutional right to assistance of counsel because counsel did not produce any witnesses upon which to base a defense and because defendant's counsel did not cross examine the witnesses more extensively. It would be an onerous burden for defense counsel to assume to be in the position of being compelled to manufacture witnesses in order to provide the defendant with a defense. No mention has ever been made by defendant that he was denied the privilege of having witnesses called in his behalf until his brief was filed with the court.

Counsel for appellant so admit in their brief. (Br. 14) It seems to be a very novel theory to have a jury's verdict set aside upon matters outside the record, particularly when these facts outside the record are in direct contradiction of the facts contained within the record. It is shown that the court gave the defendant an opportunity to produce any and all witnesses he desired and that notwithstanding, the defendant rested and made a motion for an instructed verdict. (Tr. 131-132) It appeared that the whole theory of the defense was that the Government did not produce sufficient evidence upon which a conviction of guilty could be sustained. The motion for an instructed verdict of acquittal was denied. (Tr. 132) It is believed that counsel for the appellant stated the principal governing these particular situations very appropriately on page 13 of their brief, wherein it is stated:

"It is easy, of course, for subsequent counsel in the ordinary case to frame better questions; for military strategists to demonstrate how lost battles might have been won. * * *

That is exactly what appellant's counsel appear to be doing here. The question is asked by counsel:

"Is there a searching cross-examination of the young convicts who are testifying * * * against appellant?"

(Tr. 60 through 89) Recording of Mr. McClure's cross examination occupied twice as much space in the transcript as did his direct examination by the Government. (Tr. 97 through 109) It can be said from an examination of the testimony of these two witnesses that they were telling the truth and that further cross examination would only bring out

more details of the actual commission of this crime.

“Mere dissatisfaction with the results obtained through the efforts of defendant’s attorney is insufficient to invoke the protection of the Sixth Amendment, * * *”

—*Kinney v. United States*, 177 F.2d 895;
11 Cyc. Fed. Proc., Sec. 39.77, p. 58.

Both the defendant’s trial counsel have shown that they are capable attorneys and represented the appellant very faithfully and conscientiously in the trial of this matter and they are to be commended for undertaking the defense in this appellant’s behalf in light of the insurmountable obstacles that they were compelled to face in such an undertaking.

Unless defendant’s representation by self-employed counsel was such as to make the trial a farce and a mockery of justice, mere allegation of incompetence of counsel will not suffice for the reversing of the trial court’s decision and the granting of a new trial. See *United States v. Malfetti*, 125 F. Supp. 27; 11 Cyc. Fed. Proc., 1957 Supp., Sec. 39.77, p. 18.

We might refer in this case to a quote from the decision of *Mitchell v. Thompson*, 56 F. Supp. 683, 686 and apply it to the facts in this instance (said case being cited on page 8 of appellant’s brief) :

“I am inclined to the view that when one puts his attorney’s conduct of a case in issue, as this petitioner has done, he thereby waives the privilege as to confidential communications between him and his attorney, which are relevant to that issue. It might well be that actions or omissions on the part of an attorney, now offered as proof of lack of skill or preparation, were induced by the direct command of the client. However, I

preferred to err in favor of sustaining the privilege, but in so ruling I called petitioner's attention to the possibility that I might infer from the assertion of the privilege that the excluded evidence would not be helpful to his cause and I directed his consideration specifically to the rule that in this proceeding the burden of proof was upon the petitioner. *Johnson v. Zerbst, supra*"

A client can certainly never accuse his attorney of inefficiency and misconduct merely because no witnesses are produced on his behalf, when the failure to produce such witnesses is the fault of the defendant in failing to advise his attorney of any witnesses available which would assist him in the defense. The record discloses that no witnesses were ever requested, nor subpoenaed, on the part of the defendant and there is no request of record made by the appellant personally or through counsel. The blazing general statements of the law made by appellant in his brief certainly have no application in the factual situation we have here under consideration, since they want the circuit court to assume facts which do not appear of record as being the true facts surrounding the trial of this action and, based upon such assumed facts, to reverse the decision of the trial court. The plain fact of the matter is there was no defense which the appellant's counsel could assert in defendant's behalf, because the witnesses produced by the Government positively and conclusively placed the responsibility for the commission of this crime upon the shoulders of the appellant, and that any witnesses called to testify otherwise could certainly not prove otherwise in

light of such overwhelming evidence.

This particular situation is to be distinguished from that set out in the case of *Dusseldorf v. Teets, Warden*, No. 13,337, June 30, 1953, (The decision of which was later withdrawn for technical reasons.) In that particular instance a request was made by the defendant that he be permitted to take the stand and his counsel refused to let him do so. No such situation existed in this instance.

III

There Was Sufficient Evidence to Sustain the Verdict and Judgment on Counts One and Two, and Both of Them.

In the brief filed by appellant the contention was made that there was insufficient evidence on which a conviction could be sustained. The record is replete with evidence showing: (a) burglary was committed; (Tr. 46-53, 92-93, 112, 118-120)

(b) that James Henry Audett was the person responsible for the burglary (Tr. 46-53, 92-93); and (c) the exact method used by the three aforementioned subjects in committing the burglary and the part that each person played in the prosecution of said burglary. (Tr. 46-53) It was further proved that the three subjects divided equally the monies and property taken in the burglary (Tr. 55, 91, 103) and no other explanation could be made as to how the burglary occurred other than that mentioned by the several witnesses during the course of the trial. The jury had all these facts before it in arriving at the verdict, and after receiving the instructions of the law applicable, its verdict was returned. The appellant can point out no instance where the evidence was insufficient if the jury believed the testimony

that was placed before it by the several Government witnesses.

Appellant complains that he was convicted on uncorroborated testimony of alleged accomplices. The rule applying in Federal courts as to accomplices' testimony has been stated on many occasions, and a clear statement of this rule is found in 11 Cyc. Fed. Proc., Sec. 47.171, p. 705, wherein it is stated:

"The federal courts hold that a conviction may be sustained on the uncorroborated testimony of an accomplice, or a codefendant; and a *state statute to the contrary is not controlling*. * * *"
(emphasis added)

"The credibility of the accomplice and the weight to be given his testimony are within the peculiar province of the jury and are without the boundary of judicial review. The jury may credit the uncorroborated testimony of an accomplice if after careful scrutiny the jury believes such testimony.

See *Gormley v. United States*, 167 F.2d 454; *Banning v. United States*, 130 F.2d 330, certiorari denied 317 U.S. 695, 87 L.Ed. 556, 63 Sup. Ct. 434; *Burton v. United States*, 175 F.2d 960; *Doherty v. United States*, Ninth Circuit, 230 F.2d 605; *Cam-inetti v. United States*, 242 U.S. 470, 495, 61 L.Ed. 442, 37 Sup. Ct. 192; *Holmgren v. United States*, 217 U.S. 509, 523-524, 30 Sup. Ct. 588, 54 L. Ed. 861; *Krulewitch v. United States*, 1949, 336 U. S. 440, 454, 69 Sup. Ct. 716, 93 L. Ed. 790.

Appellant further urges that he was deprived of a fair trial by reason of the fact that it is to be presumed that the accomplices received promises of a reduced sentence *in exchange for merely a little per-*

jury. (Br. 19) It appears that this is another violent accusation from which a very serious conclusion was reached, when it appears that there is nothing within the record to support such a statement. The position assumed by the appellant in this instance is ridiculous and irresponsible. Surely if there was any truth to be attached to the appellant's contentions in this particular instance, there would be some support in the record at one point or another. It is respectfully submitted that the court had all the facts before it when it passed sentence on each and every one of the subjects. There is a presumption of regularity attached to all judicial proceedings which must be overcome by the advocate if the case is to be reversed by reason of the alleged irregularities. Certainly, the appellant has failed in all respects insofar as this particular contention is concerned, since presumption of regularity of an official action can be overcome only by clear evidence to the contrary. (*Reines v. Woods*, 192 F.2d 83.)

Respectfully submitted,
BEN PETERSON
United States Attorney

By
R. M. WHITTIER
Assistant U. S. Attorney

No. 15,929

United States Court of Appeals
For the Ninth Circuit

JAMES HENRY AUDETT,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the
District of Idaho, Central Division.

APPELLANT'S REPLY BRIEF.

THOMAS M. JENKINS,

LESLIE GENE MAC GOWAN,

593 Market Street,

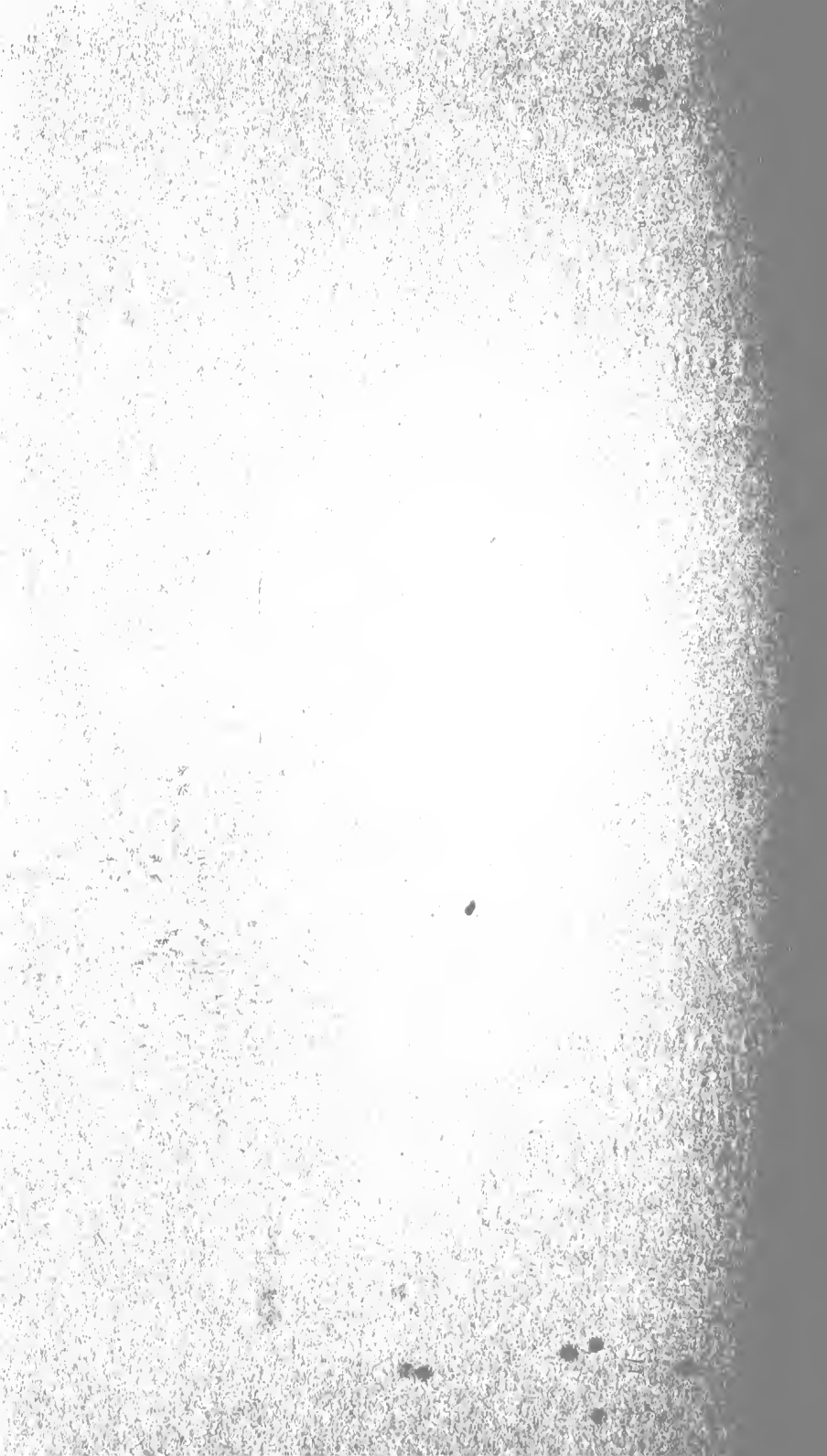
San Francisco 5, California,

Attorneys for Appellant.

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No. 15,929

United States Court of Appeals For the Ninth Circuit

JAMES HENRY AUDETT,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the
District of Idaho, Central Division.

APPELLANT'S REPLY BRIEF.

I.

REPLY TO ARGUMENT I.

As set forth in the Appellant's Opening Brief, the Fifth Amendment to the Constitution requires that "due process of law" be afforded to a person charged with an infamous crime (page 4).¹ In view of the fact that defense counsel, Mr. Miller, representing appellant was also a duly appointed United States Commissioner it is clear that appellant was deprived of the due process of law.

In the first instance Mr. Miller was not in a position to practice law before the United States District

¹Reference to page number in Appellant's Opening Brief.

Court of Idaho (pages 5-7). The Appellee's Brief asserts (page 16)² that it is permissible for United States Commissioners to practice law before the Courts of the United States. Such a contention is clearly erroneous.

The United States Code expressly prohibits the practice of law before any Court of the United States by any officer or employee of the Administrative Office. Section 607, Title 28. It is equally clear from this Code that United States Commissioners are "officers or employees of the Administrative Office". The Administrative Office receives immediate notice of a Commissioner's appointment, Section 631(a); issues him an impression seal, Section 638, and necessary office supplies, Sections 604(a)(9), 639; receives from him quarterly accounting records, Section 636; and pays him his fees, Section 604(a)(6).

The appellee also asserts that Section 607 does not govern Commissioners, but that Section 631 is the exclusive section. Section 631 is only concerned with the qualifications of a person who may be appointed a Commissioner, and his tenure. It is submitted that the preceding Section 607 was intended by Congress to govern the activities of Commissioners by utilizing the all inclusive language indicated above.

The appellee attempts to minimize the significance of having a Commissioner as defense counsel for a federal prosecution by claiming that co-counsel was the chief attorney (pages 13 and 17). Such an arrange-

²References in italics are to pages in Appellee's Brief.

ment is not disclosed in the Transcript of Record. As a matter of fact the appellant has stated, also outside the record, that he retained Mr. Miller to represent him; that he did not know Miller was the U. S. Commissioner until March 27 and that Mr. Miller conducted the trial (appellant's letter to counsel dated January 7, 1959). It is significant to note, that since no affirmative defense was advanced, the cross-examination of witnesses for the prosecution would be the important efforts of counsel. An examination of the Record discloses that of the six witnesses called by the prosecution, five were cross-examined by Mr. Miller. It was also Mr. Miller who rested the defense immediately after the prosecution's presentation. It is submitted that Mr. Miller did occupy a position of importance to the defense and therefore his presence resulted in harmful error which affected the appellant's substantial rights. This negates appellee's position with Rule 52, Federal Rules of Criminal Procedure (pages 17-18) which is concerned with harmless error.

Appellee seems to be of the opinion that Mr. Miller's moral integrity must be attacked before the circumstances of this case result in a denial of a fair trial (page 13). This is not the case. The mere presence of Mr. Miller, a United States Commissioner and an officer for the administration of the Courts, resulted in a denial of appellant's right to competent counsel necessary for a fair trial. It is the possibility of having a biased person in this position of serving two conflicting interests, that the Fifth Amendment

to the Constitution seeks to prevent. Mr. Miller had the duty as defense counsel to require his employer to prove his client's alleged guilt beyond a reasonable doubt, and to assure his client that his employer would prosecute and conduct a fair trial. These circumstances result in the curious situation where one government body has investigated, charged, and prosecuted the same crime and individual, conducted the trial, and defended, sentenced and imprisoned that same individual. Therefore, without even questioning the integrity or sincerity of any person connected with such a system, it is obvious that the Fifth and Sixth Amendments to the Constitution intended to prevent such an unfair procedure. The un-balanced trial would be subject to the inherent weakness of no adequate protection for the accused. By having a vigorous independent representation for the accused, the likelihood of the assertion of all his rights and his side of the facts will be greatly increased. Therefore, as a minimum standard of fairness, at least the procedure of trial should be such that will assure the accused of the effective assistance of counsel. Simply decreasing the possibility of an unbalanced trial is a long step toward protecting the innocent and punishing the guilty.

The appellee has placed an onerous burden on a lay person to recognize during his trial that his counsel is not adequately representing him (page 13). An individual not versed in the substantive elements of criminal law and the procedures currently prevailing in the Courts is not cognizant of his position. Indeed,

this is the very reason that he has a right to counsel not associated with the prosecution. A rule binding a defendant to the choice of an attorney who has incorrectly explained the law concerning his selection is not logical.

Also, the appellee has made an erroneous conclusion that the appellant "was fully advised as to his constitutional rights" (page 16). All that the Court asked the appellant was whether he knew that Mr. Miller was a Commissioner and if he would waive any question to the point. The appellant was not advised that the United States Code prohibited Mr. Miller to act as counsel for him. In effect, the appellant did not know what rights he was waiving. In fact the Court did not even explain to the appellant the nature of a Commissioner's appointment. Again, the need for independent counsel, who knows the law, to protect the accused's rights is apparent. Granted that appellant had the right to choose his own counsel, he should have been advised that the one he selected was not allowed to practice law in the Court where he was being tried.

II.

REPLY TO ARGUMENT II.

Appellant's assertion that he was not represented by the effective assistance of counsel, to which he was entitled, is not because his counsel declined to fabricate a defense, as appellee would lead one to believe (page 18). Rather it is appellant's belief that his trial

counsel should have gone further than cross-examining the witnesses for the prosecution and have introduced some witnesses for the defense. Appellant has stated, not in the Record, that he repeatedly requested Mr. Miller to subpoena certain witnesses who could testify to appellant's whereabouts on the day of the alleged bank robbery (page 14). The fact that such requests do not appear in the Record demonstrates the ignorance of law possessed by the appellant, and the position of Mr. Miller. Their absence in the Record does not mean that requests were not made, as appellee contends (page 21), but that they were not made properly. Again a confirmation for the need of independent counsel.

The appellee concedes "that the whole theory of the defense was that the government did not produce sufficient evidence upon which a conviction of guilty could be sustained" (page 19).

The appellee strongly contends, however, that the conviction was amply supported by the evidence (page 22). Therefore, the selection of the particular defense utilized by defense counsel, as the sole defense, was not an exercise of good judgment; particularly when the appellant requested witnesses in his behalf. Yet the appellee has great praise for the defense counsel (page 20).

The appellee did not "positively and conclusively [place] the responsibility for the commission of this crime upon the shoulders of the appellant" as they contend (page 21). The only evidence which connected the appellant with the crime was the testimony of

Hall and McClure, who were alleged accomplices. Their respective accounts of the commission of this crime, and the alleged connection of the appellant thereto is full of inconsistencies (page 20). Therefore, the admission of testimony from responsible persons that the appellant was not near the scene of the crime on the particular day would have carried great weight toward discrediting the inconsistent stories of the accomplices.

III.

REPLY TO ARGUMENT III.

The evidence upon which the conviction can be sustained was all given by self-confessed accomplices who received very light sentences for their trouble. Appellant does not charge, as is misinterpreted by appellee, that "the accomplices received promises of a reduced sentence *in exchange for merely a little perjury*" (pages 23-24). Appellant has merely pointed the vicious result of a rule of law which allows a man to be convicted of a crime on the uncorroborated testimony of a self-confessed accomplice. The result of such a rule of law necessarily is that a man guilty of a crime knows that if he will only implicate another, he will receive a reduced sentence. Appellant certainly does not suggest that the United States Attorney offered the reduced sentence in return for perjury. Appellant suggests that the temptation to commit perjury when the reward for doing so is freedom or a reduced sentence is a temptation too strong for a man with a weak conscience.

Appellee argues that the testimony of the accomplices was believed by the jury as demonstrated by their verdict. Although the jury was instructed to view the testimony of the accomplices with caution, it was not instructed of the primary reason why it should do so, namely, that an accomplice in return for his testimony could expect to receive a reduced sentence.

For the reasons set out here and in the opening brief, the conviction should be set aside.

Dated, San Francisco, California,

January 26, 1959.

Respectfully submitted,

THOMAS M. JENKINS,

LESLIE GENE MAC GOWAN,

Attorneys for Appellant.

No. 15,930

United States Court of Appeals
For the Ninth Circuit

ERNEST PICKENS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court for the
District of Alaska, Third Division.

BRIEF FOR APPELLEE.

WILLIAM T. PLUMMER,

United States Attorney,

GEORGE N. HAYES,

Assistant United States Attorney,

Anchorage, Alaska,

Attorneys for Appellee.

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No. 15,930

**United States Court of Appeals
For the Ninth Circuit**

ERNEST PICKENS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the District Court for the
District of Alaska, Third Division.**

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

Appellant was tried to a jury in the District Court, Third Judicial Division, District of Alaska, for violation of Section 65-4-3 ACLA 1949. The jury found defendant guilty of manslaughter, a lesser included offense. Defendant was sentenced on December 31, 1956, by the trial Court to a term of four years imprisonment, with two years of the sentence suspended. Execution of said sentence has been stayed pending outcome of the present appeal. Jurisdiction is conferred on this Court by Title 28 USCA 1291.

STATEMENT OF FACTS.

A. Pleadings.

The grand jury for the Third Judicial Division, District of Alaska, brought an indictment against

appellant and two other defendants charging them with the murder of one Jack McCann in the second degree. The grand jury charged a violation of Section 65-4-3 ACLA 1949. Prosecution followed upon the indictment.

B. The Facts.

On or about April 14, 1956, a Saturday evening, defendant William C. Golley was in the company of victim Jack McCann. They were riding in Golley's automobile. Golley stopped and picked up defendant Fitzhugh and defendant-appellant Pickens. They all four rode a short distance. The car stopped. They all got out. Appellant Pickens grabbed the victim's hat and together with co-defendant Fitzhugh, taunted the victim. Appellant, who was in an intoxicated condition, swung at the victim in a menacing manner. His swing was awkward and it missed the victim. Defendant Fitzhugh then began to beat the victim about the head with his fists. The victim fell to his knees but got up again. The victim walked a few yards and fell down. The victim died as a result of the blows inflicted on him. The deceased did not strike or offer to strike any of the defendants or the appellant-defendant.

After the beating, the defendant Fitzhugh and defendant-appellant Pickens left and met each other at a local bar. The victim was taken to the police station and then to the hospital where he was pronounced dead.

QUESTIONS INVOLVED.

The points of error relied upon by the appellant may be grouped under the following headings:

1. Error in the Court's Instructions.
2. Misconduct of the Prosecutors.
3. Error in the Court's refusal to grant various motions made by defendants.

These points were raised in the trial Court through objections and motions by the defendant. There is one assignment of error, however, that is raised here for the first time. That is error number five. The objection to the instruction on the subject of aider and abettor was raised in the trial Court, but on a ground different from that raised by defendant on appeal.

ARGUMENT.

The Government will argue defendant's assignments of error in the order listed by defendant in his brief. Defendant specifies seven assignments of error on pages 9 to 13. He argues them on pages 14 to 37 inclusive.

ERROR NUMBER ONE.

Pages 9 and 14, Defendant's Brief.

INSUFFICIENCY OF THE EVIDENCE TO JUSTIFY THE VERDICT.

There is evidence showing that defendant-appellant Pickens was in the company of defendant Fitzhugh prior to and after the altercation with the deceased.

There is further evidence that appellant and defendant Fitzhugh taunted the deceased and that during the taunting appellant struck at or toward the deceased. (Pages 541; 571-2-3; 578-9; 581; 598-9; 607-8; 625; 652-3; and 956-7-8 R.) Defendant Fitzhugh proceeded at once to pummel the deceased and the evidence indicates that the deceased expired as a result of blows inflicted upon him. Appellant was an aider and abettor of defendant Fitzhugh and there was sufficient evidence to warrant convicting him of the crime of manslaughter.

In *Mobley et al. v. State*, 85 NE 2d 489, Supreme Court of Indiana (1949) the Court said actively to countenance and support the doing of a criminal act by another is to encourage it within the statute permitting one who aids or abets in the commission of a felony to be prosecuted as a principal. In the *Mobley* case a mother and her boy friend were charged with beating her child to death. They were convicted. She appealed. The Court said:

“Even if the jury had not believed that violence by the mother caused or helped to cause the child’s death, it reasonably could have found that she aided and abetted Fagan in causing it . . . It is true that mere presence of an accused at the time and place of the crime alleged is not sufficient to make such accused guilty, but if from the facts and circumstances surrounding the defendant’s presence at the time, and from defendant’s conduct it appears that the defendant’s presence did in fact encourage someone else to commit the act, guilt may be inferred.”

The Court added that

“... the trier of facts may consider failure of such person to oppose the commission of the crime in connection with other circumstances and conclude therefrom that he assented to the commission of the crime, lent his countenance and approval thereto and thereby aided and abetted it.”

In *State v. Williams*, 33 SE 2d 880, Supreme Court of North Carolina (1945) the two defendants both shot twice at deceased. Deceased was hit by one bullet. He fell at the firing of the fourth shot. Both defendants were convicted. The defendant who fired shots one and two appealed. The appellant maintained that:

1. There was no evidence he fired the fatal shot and
2. No evidence of any conspiracy to kill deceased.

The Court said that it was true that no conspiracy was shown, but added that it was not necessary. The Court further stated that even if the fatal bullet was not fired by the appellant, yet his presence under the particular circumstances of the case sufficed to make appellant an aider and abettor. The circumstances were that appellant was a friend of the actual killer, that his presence was an encouragement and a sign of protection to the killer. The Court said that the appellant could be an aider and abettor as a matter of law, and it was for the jury to decide. The difference between the *Williams* case and the present one is that fists were used by the appellant in the latter,

whereas a gun was used by the appellant in the *Williams* case. In addition, the appellant Pickens, in the present case, may have been drunk.

In *McKinney v. Commonwealth*, 243 SW 2d 745, CCA Kentucky (1940) the Court stated that it was not essential that there should be a pre-arrangement or a mutual understanding or concert of action; but in the absence of these, it is essential that one so charged should in some way either by overt act, by expression of advocacy or sympathy, encourage the principal in his unlawful acts. In *People v. Sink et al.*, 30 NE 2d 40, Supreme Court of Illinois (1940), Sink and another had each struck the victim a blow. The victim died. Both were tried and convicted of manslaughter. Both appealed and said that there was no evidence that the blow they struck caused the death. The Court said there was sufficient evidence and added further (page 43):

“If the evidence had shown one defendant struck the blow that caused a particular injury and such injury caused death, that would not avail the other defendant anything, for under the circumstances he would be deemed to be an accessory and by virtue of the statute, liable as a principal.”

Gooch v. United States, 82 F 2d 534, CCA 10 (1936) recognizes the principle that an act of one perpetrator is imputed to all who are aiders and abettors even though the specific criminal result is not intended by the other party. The intent on the part of Pickens was to commit an unlawful battery upon the deceased. Pickens had begun by taunting the deceased. He was

joined by Fitzhugh in that taunting. Pickens had a tussle with the victim. (R. 571-2-3.) Pickens swung at him although he missed. Fitzhugh continued the affray.

Neither appellant Pickens nor Fitzhugh need have had the intent to kill the victims. They need only have had the intent to commit an unlawful battery upon him and they need only have acted together to accomplish the battery. The jury could very well find that Pickens' taunting of the victim and his subsequent swing at him would encourage and spark Fitzhugh's attack. The situation at the scene was tense. Pickens' attack upon the victim, though awkward, was sufficient to ignite Fitzhugh's temper and give him the courage to attack the victim. It was Pickens' intent to do violence to the victim. His drunkenness was not sufficient, according to the evidence, to deprive him of any intent to commit a battery, but apparently it was sufficient to prevent him from committing a successful battery upon the victim. Pickens' and Fitzhugh's unlawful conduct was the proximate cause of the victim's death. The jury finding that they committed manslaughter is supported by the evidence.

The Government agrees that mere presence at the scene of a crime does not make one an aider and abettor. There must be facts and circumstances which indicate, beyond a reasonable doubt, that the bystander either conspired with the actual perpetrator of the crime to commit the crime, or that he encouraged the perpetrator in the commission of the

crime or that he participated in the actual commission of the crime. In the present case, the evidence, if believed, does show that appellant was an aider and abettor.

ERROR NUMBER TWO.

Pages 9 and 29, Appellant's Brief.

MISCONDUCT OF THE PREVAILING PARTY.

The statement of an Assistant United States Attorney in her voir dire examination of jurors concerning appellant's reputation was improper. It should not have been made. However, it was not prejudicial. In fact, defense counsel (R. 127) withdrew his Motion for Mistrial and substituted an objection. The instruction which the Court gave to the jury (R. 127-8) that they were to pass upon the case from the evidence only, and not the statements of counsel, cured the error. The prosecutor's remarks did not disparage the defendant's character or reputation in such manner that instructions by the Court could not cure the error.

The effect of the course of conduct of the prosecutor is much the same on voir dire as in opening statement. The opening statement is even more important in that it is directed to the jury and not to an unsworn panel. Yet misconduct by the United States Attorney in mentioning the accused's character in opening statement was held not to be error in several cases. In the case of *Myres v. United States*, 174 F 2d 329, CAA 8 (1949) the defendant was prosecuted for violation of the income tax laws. In the

opening statement the Assistant United States Attorney told the jury as follows:

“I am going to show you that the defendant was cheating his dying partner.”

The District Court sustained an objection to that statement and instructed the jury to disregard it. The Court of Appeals said (page 339):

“The statement of counsel should not have been made. The defendant was not charged with cheating his partner but with having deliberately attempted to cheat the United States. The prompt action of the District Court prevented the improper argument from ripening into prejudicial error.”

In the case of *McFarland v. United States*, 150 F 2d 593, CCA D.C. (1945) the Court held that the prosecutor's opening statement suggesting that the defendant had used fictitious names earlier in his life and that he had had a criminal record was not such misconduct as to warrant reversal. The evidence in that case did not even bear out the prosecutor's improper remarks. In the case of *Foley v. United States*, 241 F 587, CCA 8 (1917) the prosecutor made a remark concerning the reputation of the defendant in his opening statement. The Court of Appeals held that while improper, it did not warrant a reversal of the case.

While the voir dire remarks of the prosecutor were improper, they were not of such grave nature that an instruction from the Court could not cure the effect

that the comments had upon the jury. The Court did give such instruction.

ERROR NUMBER THREE.

Pages 9 and 32, Appellant's Brief.

MISCONDUCT OF THE PREVAILING PARTY.

The prosecutor's statement in final argument characterizing appellant Pickens and Fitzhugh as "a couple of bar room bullies spoiling for a fight and looking for one" is not error. It was an accurate description of what their conduct was at the time of the crime. It did not touch upon their reputation or character. In the case of *Percy William Herman v. United States*, 220 F 2d 219, CCA 4 (1955) the prosecutor, in final argument, referred to the defendant in a fraud case as a "living fraud" and a "living lie." The Court said the characterization of the defendant, on the basis of the evidence before the jury, was so accurate as to admit of no justifiable criticism. In *United States v. Markham*, 191 F 2d 936, CCA 7 (1951) the prosecutor during final argument in a narcotics case, referred to the defendant as "a trafficker in human misery." The Court said such a reference was proper in view of the evidence. In *United States v. Freeman*, 167 F 2d 786, CCA 7 (1948) the Court said that the District Attorney may speak harshly about the defendant's conduct if the facts warrant it. In the present case, the facts did warrant what the prosecutor said about the appellant.

ERROR NUMBER FOUR.

Pages 9 and 34, Appellant's Brief.

MISCONDUCT OF THE PREVAILING PARTY.

The prosecutor's remarks about Mr. Fitzhugh's hands cannot be interpreted as a comment upon the failure of either Fitzhugh or the appellant to testify in the trial. (R. 1321-2.) The comment referred, indirectly, to the condition of defendant Fitzhugh's hands at the time of the homicide and not at the time of the trial. Pickens' name wasn't even mentioned by the prosecutor in connection with this assignment of error.

ERROR NUMBER FIVE.

Pages 10 and 35, Appellant's Brief.

ERROR OF THE COURT IN HIS ORAL INSTRUCTIONS WITH RESPECT TO THE MEANING OF THE WORDS AID AND ABET.

Counsel for appellant Pickens did not object to the mere oral illustration of the meaning of the words "aid" and "abet" by the trial Court for the benefit of the jury. Pickens' objection at that time (R. 1426) was on the failure of the Court to instruct properly on the meaning of the words "aid" and "abet". Defendant's brief (page 36) raises a new point not raised at the time of the trial. Defendant must raise the objection at the time of trial or he will be deemed to have waived it. *Morrissey v. United States*, 70 F 2d 729, CCA 9 (1934) and *Hammond v. United States*, 246 F 40, CCA 9 (1917). Further, the fact that the jury had deliberated several hours before the definitions of the words "aid" and "abet" were given is

of no consequence. In the instruction to the jury the Court merely defined the legal meaning of two words. The Court's definition of these words was correct. He did not qualify or explain his instruction to the jury.

ERROR NUMBER SIX.

Page 6 only, Appellant's Brief.

ERROR OF THE COURT IN HIS INSTRUCTION NUMBER FIVE.

Defendant, in his brief in Argument, makes no reference to this point and the Government assumes that there is no argument on it. The instruction was a correct statement of the law and not at all prejudicial to the defendant-appellant.

ERROR NUMBER SEVEN.

Pages 7 and 37, Appellant's Brief.

**ERROR IN REFUSAL TO GRANT THE MOTION OF THE
DEFENDANT PICKENS FOR A SEPARATE TRIAL.**

Alaska law is silent on the matter except for one statute which reads as follows:

Title 66-9-22 ACLA 1949, *Conviction of One or More Defendants*. "That upon an indictment against several defendants any one or more may be convicted or acquitted." (CLA 1913, Section 2166; CLA 1933, Section 5227.)

Rule 14, Federal Rules of Criminal Procedure, governs in this case. The defendant does not indicate why a separate trial should have been granted. He states on page 37 of his brief that a separate trial would have avoided confusion, but he does not indicate where confusion in the trial did in fact occur. The

mere fact that a possibility of confusion exists does not warrant refusal on this ground. (*Opper v. United States*, 348 U.S. 84, CCA 6 (1954). Also in *Schockley v. United States*, 166 F 2d 704, CCA 9 (1948) the Court stated that it is within the sound discretion of the trial Court to grant or refuse separate trials for several defendants. In the present case, the trial Court did not abuse his discretion in the matter.

CONCLUSION.

There was sufficient evidence to warrant submission of the matter to the jury. Whether defendant-appellant Pickens' conduct did in fact aid and abet defendant Fitzhugh in killing the victim was a matter of fact to be decided by the jury. They decided that Pickens was in fact an aider and abettor and that the degree of homicide was manslaughter.

There was no prejudicial error committed at the trial. The verdict of the jury and judgment of the trial Court should be sustained.

Dated, Anchorage, Alaska,
August 19, 1958.

Respectfully submitted,

WILLIAM T. PLUMMER,
United States Attorney,

GEORGE N. HAYES,
Assistant United States Attorney,

Attorneys for Appellee.

No. 15931

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANDREW SHANNON, MATTIE SHANNON and ROGER
WALTER HARRISON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney
Chief, Criminal Division,

LEILA F. BULGRIN,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee United
States of America.

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No. 15931

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANDREW SHANNON, MATTIE SHANNON and ROGER
WALTER HARRISON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

On August 14, 1957, an Indictment was filed against appellants in which the Grand Jury for the Southern District of California charged three separate sales of heroin in as many different counts under Section 174 of Title 21, United States Code. Count One charged, in effect, that on May 15, 1957, appellants Andrew Jackson Shannon and Roger Walter Harrison sold approximately one ounce, 198 grains of heroin to Cecil Thomas, which heroin had been imported into the United States contrary to law, as said appellants well knew. Count Two charged, in effect, that on May 17, 1957, appellants Andrew Jackson Shannon and Mattie Shannon sold approximately one ounce, 234 grains of heroin to Cecil Thomas, which heroin had

been imported into the United States contrary to law, as said appellants well knew. Count Three charged, in effect, that on May 23, 1957, appellant Andrew Jackson Shannon sold approximately one ounce, 351 grains of heroin to Cecil Thomas, which heroin had been imported into the United States as said appellant well knew.

The District Court had jurisdiction of the cause under Section 3231 of Title 28, United States Code, which confers on all District Courts original jurisdiction "of all offenses against the laws of the United States."

The jury was selected for the trial of the case on October 29, 1957, and the taking of evidence commenced on October 30, 1957, before the Honorable Peirson M. Hall, Judge presiding. On November 4, 1957, the jury returned a verdict of guilty as charged in each of the three counts, Andrew Jackson Shannon, being guilty of each count, Mattie Shannon, being guilty of Count Two and Roger Walter Harrison being guilty of Count One. On December 2, 1957, Andrew Jackson Shannon was sentenced to a total of fifty years on all three counts. Roger Walter Harrison received a sentence of ten years on Count One. Mattie Shannon received a sentence of fifteen years on Count Two.

On or about December 9, 1957, a Notice of Appeal to this Honorable Court was filed. Thereafter, the Appeal was docketed and Appellants' Opening Brief filed.

Jurisdiction of this court stems from Section 1291 of Title 28, United States Code.

II.

The Statute Under Which the Appellants Were Prosecuted.

The Indictment in this case was brought under Section 174 of Title 21, United States Code, which provides as follows:

“Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000.

* * * * *

“Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.”

III.

Statement of the Case.

The sequence of events in this case with respect to the matters pertinent to the issue on appeal is as follows:

Detailed testimony as to the transactions upon which the Indictment was based was offered by the Government during the trial of the case through various witnesses. [Rep.

Tr. pp. 1-254.] Thereafter, the Government rested its case. A discussion was then had between the Court and all counsel with respect to the possible time which would be consumed in finishing the trial. [Rep. Tr. pp. 254-256.] Judge Hall inquired about certain photographs which counsel for the defendants had indicated they might offer in evidence. Upon being informed by one of such counsel that she did not have them in her possession, the court commented that, in effect, that the jury could be sent out to the scene of most of the happenings involved in the case, which was an apartment house on 3703 W. 27th Street in Los Angeles, California.

Mr. Weiss commented: "That would be a great idea" and Mrs. Jefferson stated: "I didn't know whether your Honor would grant such a request." She then went on to say: "I think it is very important. I have been out there."

At that time, Government counsel interposed, in effect, an objection to the jury viewing the property because of the possibility that the premises, particularly shrubbery, may have changed from the time of the events which occurred in May of 1957 to the time of the proposed jury view in November of 1957. [Rep. Tr. pp. 256-257.] After some discussion of this objection, Government counsel was informed by one of the Narcotics Agents that, as far as was known, there had been no definite major "shrubbery" changes and that the premises to all appearances had remained the same. The Court made an order that the jury would be taken out the next day to see the premises at approximately 10:00 A.M. The Court stated:

"The defendants are entitled to be present *unless they waive that right*. The jury will go out. The jury and the Clerk and myself and the Bailiff will go in

the bus, and I think you [Mrs. Bulgrin] had better have Mr. Farrington there and Mr. Ross and Mr. Richards. The Court Reporter will go with the jury and the Judge and the Clerk in the bus, and the rest of you will get there by what ever means you can." (Emphasis ours.)

The Court further stated that the defendants themselves would be at the Federal Building at 9:30 A.M. and the Marshal would take them out to the scene. All of this discussion was had in the presence of all counsel and all three defendants. [Rep. Tr. pp. 258-261.]

The record shows that at 9:50 o'clock on November 1, 1957, the Court, jury, Bailiff, and Court Reporter were present at the address of 3703 W. 27th Street, which was located on 27th Street West of 7th Avenue in Los Angeles. Each of the appellants was present, as well as the three counsel for appellants, Mr. Weiss, Mr. Sherman and Mrs. Jefferson. In addition, this writer, as counsel for appellee, was present, together with certain Government and local Narcotics Officers, among whom were Philip P. Ross and William R. Farrington, who had testified in the case.

Since it was obvious from the testimony taken in court that the events which occurred at or near the vicinity of 3703 W. 27th Street involved some of the most important facts in the case, a considerable amount of additional testimony was taken there in the presence of all the above persons, including the three appellants. This testimony was substantially devoted to pointing out the various parts of the area which involved the previous testimony and included reenacting certain events which had been described earlier in court. This was all done without objection from appellants, except as to a few isolated ques-

tions which were asked of the witnesses. In fact, counsel for the appellants all participated in questioning the witnesses. They were given every opportunity to go into any matter they desired with respect to the witnesses' testimony in connection with the premises being viewed by the jury. The jury was also given the opportunity in the presence of the appellants and their counsel to view as much of the property as was relevant to the inquiry in question. They were taken around to the rear of the property, as well as being given an excellent view of the front of the apartment and the particular part of the property on which was the back "stoop" where certain money was left and picked up from underneath a garbage can. They were also shown the area on the opposite side of the street where another transaction took place, in that a quantity of narcotics was alleged to have been left at that point by Cecil Thomas and thereafter picked up by appellant Roger Harrison. [Rep. Tr. pp. 265-297.]

The specific part of the transcript which is particularly involved in the question on appeal is at pages 297-299 thereof, and concerns the approximate time during which the jury left the above address and returned to the Federal Building. However, upon a careful scrutiny of this part of the proceedings, it appears that the transcript is confused as to what occurred, even with the addition of the affidavit by the Court Reporter to the effect that the four sentences on page 299 should be inserted immediately following line 4 on page 298.

Appellee calls this Court's attention to the fact that at page 297 of the Reporter's Transcript of Proceedings, it is set forth that Judge Hall stated: "By the way, here is a wall described by Mr. Farrington with the chain links above it." Immediately thereafter it is noted "(The

following proceedings were had on the bus enroute back from the premises.)” It is after this notation that the testimony appears to be confused.

Immediately following the above notation in parenthesis the transcript shows as follows:

“The Court: Where is the Ralph Market and drug store?

Witness Farrington: At Seventh Avenue and West Washington.

The Court: This is Seventh Street?

Witness Farrington: This is Seventh.

A Juror: We saw it when we turned the corner.

Another Juror: I wonder if we can go back the other way?

The Court: Yes, we can go back up there and come back Washington.

Mrs. Bulgrin: Does the jury wish to see the drug store?

The Court: Just to go by?

Mrs. Bulgrin: Just to go by. I want them to see the phone booth. Then we will proceed back to the Court.

The Court: Very well.”

The above quoted material from the transcript does not indicate that those proceedings were had on the bus “enroute back from the premises” as indicated in the statement in parenthesis. In the first place, this writer was not, as shown above from the transcript of proceedings, on the bus with the jury, Bailiff, Reporter and Court. (It is also apparent from the transcript that the witness, Farrington, was not on the bus.) Obviously the participants in the conversation were talking about the return

trip *to be taken*. This is particularly clear when this writer's inquiry was made to the Court as to whether or not the jury wanted to go by the drug store. Thus, this conversation took place in the presence of the appellants, their counsel, government's counsel and all those concerned with the case who had been brought out to the above address.

The material at page 299 which was inserted immediately below the above quoted material is as follows:

"This is the corner of Seventh Avenue and Washington, and here is a drug store and beyond is a Ralph Market and over there is a parking lot.

Very well."

There is no explicit indication in the transcript as to who made the above statement, as it is now inserted at the place indicated on page 298, but it may have been the Court speaking.

Next shown in the transcript of proceedings is the statement made by this writer concerning the witness Ross' mother going to Mexico and the fact that he was supposed to take her to the airport at 11:00 o'clock. The Government asked that he might be excused at "this" point if the appellants had no objection. There was no objection from appellant's counsel and the witness arranged to be back at 2:00 p.m. That witness was not on the bus either. That is the end of the proceedings which are immediately concerned with the issue on appeal.

As indicated above, the transcript showed that all of the proceedings which we have quoted immediately above took place on the bus. However, it is obvious from the transcript that the witness Farrington was not on the bus, nor was this writer, nor Mr. Weiss or Mr. Sherman or

Mrs. Jefferson. Thus, the conversation could not all have taken place on the bus, if indeed, any of it did, since counsel and the witnesses had driven back in their own transportation.

It is obvious that the only small part of the entire proceedings which could have taken place on the bus in the absence of appellants and counsel was: "This is the corner of Seventh Avenue and Washington and here is a drug store and beyond is a Ralph Market and over there is a parking lot. Very well."

Clearly, before the Court and the jury got on the bus the Court inquired in the presence of the appellants and their counsel as to the location of a Ralph Market and drug store, a location mentioned in the testimony of some of the Government's witnesses. It was also made plain that the appellee was suggesting that the jury "just go by the drug store." There was no objection from counsel for the appellants or appellants to the obvious plan of the Court and the jury to merely ride by a certain Ralph Market and the drug store.

Since there is still a considerable amount of confusion in the pertinent part of the record involved in this appeal, appellee has contacted Agnar Wahlberg, one of the official court reporters involved in the preparation of the records herein, and arranged for him to reexamine his notes upon his return from vacation on or about October 27, 1958. After such an examination is made, appellee will act accordingly in connection with any possible motion to correct the reporter's transcript of proceedings to a further extent.

IV.

Argument.

At the writing of this brief, appellee feels that there is an insufficient record of the proceedings which occurred in the period of time represented by pages 297 to and including 299 of the transcript for this Honorable Court to make any determination whatsoever as to exactly what happened from the time the jury was leaving the vicinity of 27th and Seventh Street in Los Angeles, California up to the time the jury arrived at the Federal Building in Los Angeles on the same day. If the record cannot be clarified to any greater degree than has been shown in the affidavit of Agnar Wahlberg, attached to Appellant's Opening Brief, it is respectfully submitted that the record on that point is in too confused a state for a consideration of the question raised. This is particularly true in view of the fact that the record of proceedings shows that all three appellants received a fair trial and, during the jury's view of the above premises, were afforded a complete opportunity to participate in the questioning of the witnesses at the scene, to view the entire premises and to request the Court to take such action at that time with respect to the trial of the case which would best suit their own interests. They did so participate, the only few objections being to certain isolated questions asked of the witnesses. But, as to the entire proceedings at the above address, appellants' counsel, Mr. Weiss, in particular, thought that the idea was "great" [Rep. Tr. p. 256], beforehand. None of the counsel made a complaint after the jury returned to the Federal Court that the proceedings had been unfair or partial or that the appellants had had an inadequate opportunity to take such action as was deemed warranted for their defense.

Of course, in connection with the state of the record, appellee will make every effort to clarify it before the hearing on the matter, so that the issue raised may be disposed of upon the merits. Assuming that this can be done or that the Court would feel that the present record shows that the jury did drive by the corner of 7th Avenue and Washington and saw the drug store and Ralph Market in passing, appellee will discuss the question of whether or not any error was thus contained in the record.

It is respectfully submitted to this Court that no error is contained in the record and, further, defendant was not prejudiced in any way by the proceedings connected with the jury's alleged view of the said premises.

It is obvious that the most that could have happened after the jury left the vicinity of the address indicated was that they could have gone by the corner of Seventh Avenue and Washington and, in passing by, looked at a drug store and a Ralph Market. It is further evident that, before the jury, Court, bailiff and Reporter left on the bus that this writer discussed in the presence of appellants and their counsel the question of the jury going by the drug store "just to go by." At that point there was no objection or comment made by the counsel for appellants or the appellants to the jury seeing the drug store on their way back to the Federal Building. Further, the record in its present state indicates that the jury, on its way to the address noted above, had seen the Ralph Market at Seventh Avenue and West Washington. [Rep. Tr. p. 297.] There was no complaint from appellants or their counsel because of that fact. During the trip made by the jury to and from the above premises there was no evidence taken from any of the witnesses in the case nor was any

comment made to the jury by counsel for appellee, since neither such witnesses nor this writer were on the bus on either occasion.

Assuming, *arguendo*, that it could be remotely felt that some error occurred in the jury merely traveling by the drug store and Ralph Market, it is clear from the record that the defendants waived any objection to such proceedings by a failure to object with full knowledge of what would probably happen on the route of travel to be taken on the way back to Court. Further, as stated above, in view of the full opportunity of appellants to participate in the proceedings at the jury's view of the other premises, which involved the most important events in the case, there was absolutely no possibility of any prejudice to the appellants.

Although the factual situation in the case of *Deschenes v. United States*, 224 F. 2d 688 at 693 (10 Cir., 1955), was different in that the question involved the lack of appellant's presence at certain conferences between counsel and the Court, the language in the opinion is of interest in the present question.

“* * * neither appellant nor his counsel made a specific request for appellant to be present at these conferences, and no complaint or objection was lodged to the practice. He therefore cannot complain of any possible prejudice.”

Again, in a case involving arguments on objections made by counsel at the bench where defendant was not present, although in the courtroom, the court held the assignment of error was wholly without merit. Although, as in the *Deschenes* case, the situation was different from the facts in within matter, the language of the Court in the *Steiner*

opinion, 134 Fed. 931 (5 Cir., 1943), at page 935, would also be of interest here.

“Neither he nor his counsel complained or made objection at any time to the practice, and we think it clear that he was in no wise prejudiced. Both he and his counsel were satisfied with the procedure at the trial, and the assignment of error and the contention on the point seems to be *nothing more than an after-thought by which fair conduct, in which they acquiesced and participated, is sought to be distorted into impropriety and alleged prejudicial error.*” (Emphasis ours.)

The above quoted language from the *Steiner* case appears to be descriptive of the situation herein.

In the case of *Ng Sing, et al. v. United States*, 8 F. 2d 919 (9 Cir., 1926), at page 922, it appears that during the trial of the case, which involved a narcotics charge, two of the jurors visited storerooms of the appellant and a place at the rear where the opium was found. Apparently this was done without the knowledge of anyone else involved in the case. The alleged error was contained in a motion for a new trial, which, of course, was addressed to the sound discretion of the trial court. The Court of Appeals held that no abuse of discretion was shown. It is of interest herein that the Court of Appeals stated that it seemed the trial court was convinced the appellants (plaintiffs in error) were in no wise prejudiced by the incident complained of.

It is submitted that the question of prejudice could be considered on such an alleged error on an appeal from a judgment of conviction, and it is clear in the within case that there was no prejudice to any of the appellants by the alleged view of the jury of a drug store and a market on passing by.

Again, in the case of *Cochran v. United States*, 41 F. 2d 193 (8 Cir., 1930), at page 207, it appeared that during the trial and without knowledge of the court or counsel for either side, certain jurors viewed some of the properties involved in the case. This view was not pursuant to direction of the Court or with the knowledge of counsel. The incident was set forth in a motion for a new trial and the Court of Appeals, in discussing the matter, stated with respect to the viewing:

*"This was not a part of the trial, and, in the absence of a showing of prejudice is not grounds for reversal. Valdez v. United States, 244 U. S. 432, * * *"*
(Emphasis ours.)

In *Roberts v. United States*, 60 F. 2d 871 (4 Cir., 1932), the matter of four jurors viewing the premises where a crime was alleged to have been committed during the progress of the trial, without authorization, was presented on a motion for a new trial. The Court stated, at page 872:

*"The rule is well settled than an unauthorized view or inspection by members of the jury, while improper, is not ground for a new trial unless it appears that the verdict was affected thereby. 20 R.C.L., and cases cited. * * * There is nothing in the record before us which shows that the defendant was in any wise prejudiced by the conduct of the jurors in viewing the premises or that the trial Judge abused his discretion in denying the motion for new trial made on that ground."* (Emphasis ours.)

Thus, although the error complained of in those three cases was presented on a motion for a new trial rather than as an assignment of error on appeal, it is of interest to note that the Courts of Appeal were primarily concerned

with the question of whether or not the defendant had been prejudiced by the unauthorized action of jurors in viewing certain premises involved in the trial. One Court even stated the Jury view was not part of the trial. (However, it should be noted the view was not under the auspices of the Court.)

The case of *Valdez v. United States*, 244 U. S. 432, *supra*, is also of interest in connection with this question. In that early case, decided in 1917, one of the questions on appeal was, "Whether the absence of the accused during a part of the proceedings in the trial constitutes an error requiring reversal * * *" The case involved a complaint under the procedure of the Philippine Islands for the crime of murder. An inspection of the scene of the murder was made by the trial judge. Valdez, the appellant, was not present but his counsel were.

At page 445 the Supreme Court of the United States, after discussing the facts involved, stated:

"Such being the record, we must assume that the judge in his inspection of the scene of the homicide was not improperly addressed by anyone and, in the presence of counsel, did no more than visualize the testimony of the witnesses—giving it a certain picturesqueness, it may be, but not adding to or changing it. It would be going a great way to say that the requirement of the Philippine Code, carrying the constitutional guarantee to an accused to 'meet the witnesses face to face,' was violated and could not be waived. And we think practically Valdez' presence was waived.

"But, aside from any question of waiver, it would be pressing the right of an accused too far and *Diaz v. United States*, 223 U. S. 442, beyond its principle

to so hold. As well might it be said that an accused is entitled to be with the judge in his meditations and that he could entertain no conception nor form any judgment without such personal presence.

"The judgment should not be reversed upon a mere abstraction. It is difficult to divine how the inspection, even if the affidavits of the defendants should be taken at their face value, added to or took from the case as presented.

"It follows that the judgment of the Supreme Court must be and it is affirmed." (Emphasis ours.)

In *Snyder v. Massachusetts*, 291 U. S. 97 (Jan. 8, 1934), a trial was held in the State Court of Massachusetts for murder. One of the defendants made the claim on appeal that through the refusal of the trial judge to permit him to be present at a view there had been a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States. There, as in the *Valdez* case, the appellant was not present to view the scene with the jury. However, they were accompanied by the Judge, the court reporter, the district attorney and counsel for the defendant. Likewise, as in the *Valdez* case, the proceedings during the time the jury was viewing the premises were extensive and much attention was given to the details of the scene.

The Supreme Court stated, beginning at page 105:

"We assume in aid of the prisoner that in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has the relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. Thus, the privilege to confront one's accusers and cross examine

them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the federal court * * * and in prosecutions in the state court is assured very often by the constitutions of the state. For present purposes we assume that the privilege is reinforced by the Fourteenth Amendment, though this has not been squarely held."

The Court went on to quote the case of *Diaz v. United States, supra*, and stated:

"No doubt the privilege may be lost by consent or at times even by misconduct. * * * Our concern is with its extension when unmodified by waiver, either actual or imputed."

The Court went on to say:

"Nowhere in the decisions of this court is there dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence *when presence would be useless, or the benefit but a shadow*. * * * So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.

"We are thus brought to an inquiry as to the relation between the defendant's presence at a view and the fundamental justice assured to him by the Constitution of the United States.

"At the outset we consider a bare inspection and nothing more, a view where nothing is said by anyone to direct the attention of the jury to one feature or another. The Fourteenth Amendment does not assure to a defendant the privilege to be present at such time. *There is nothing he could do if he were*

there, and almost nothing he could gain. The only shred of advantage would be to make certain that the jury had been brought to the right place and had viewed the right scene. If he felt any doubt about this, he could examine the bailiff at the trial and learn what they had looked at. * * * Here the chance is so remote that it dwindles to the vanishing point. * * * *There is no immutable principle of justice which secures protection to a defendant against so shadowy a risk.* The argument is made that conceivably the place might have been changed in a way that would be material. * * * Indeed the record makes it clear that upon request he would have been allowed to go there afterwards in company with his counsel. Opportunity was ample to learn whatever there was need to know."

* * * * *

"If the risk of injustice to the prisoner is shadowy at its greatest, it ceases to be even a shadow when he admits that the jurors were brought to the right place and shown what it was right to see. That in substance is what happened" here. * * * Nowhere is there a suggestion of any doubt as to the place." (Emphasis ours.)

The Court then went on to talk about an inspection where counsel are permitted, without any statement of the evidence, to point out particular features of the scene and to request the jury to observe them. The Court stated that Massachusetts law holds that such statements, so restricted, are proper incidents of a view. At page 116, after discussing fully the problem, the Court said:

"* * * Nor has the defendant been denied an opportunity to answer and defend. The Fourteenth Amendment has not said in so many words that he

must be present every second or minute or even every hour of the trial. * * * Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept."

The Court then discussed in several more pages the question of whether or not the defendant had been denied his constitutional rights, commenting at page 119:

"Other courts have held, and plainly with the better reason, that physical objects are not witnesses, even though they have the quality of evidence, and that the defendant is at liberty to waive the privilege to view them, if such a privilege exists. * * *"

Of course, the Court noted that Massachusetts law is to the effect that waiver is unnecessary and that the defendant may be excluded in the discretion of the judge. (Counsel for the appellant in the *Snyder* case had moved that his client be permitted to view the scene with the jury and the motion had been denied by the trial court.) Still, the Supreme Court of the United States affirmed the judgment below, stating that the Supreme Court would not supersede the judicial decisions of Massachusetts on the ground that they deny the essentials of a trial because opinions may differ as to their policy of fairness.

Thus, although there seems to be no federal decision directly in point of the situation herein, and it does not appear that the federal rule has been heretofore clarified, it is submitted that the rule should follow the reasoning of the *Snyder* case, that: "* * * to make the securities of the Constitution depend upon such quiddities is to cheapen and degrade them." (P. 122.) Apparently the Supreme Court there felt that the defendant is at liberty to waive the privilege to view physical objects, *if such a privilege*

exists. In the within case there was certainly a waiver of any such privilege to view the premises with the jury. Even aside from the question of waiver (or lack of prejudice on a *de minimis* principle) with respect to Rule 43 of the Federal Rules of Criminal Procedure, it is not said in so many words that the defendant must be present “every second, or minute, or even every hour of the trial” because “fairness is a relative, not an absolute concept.” Particularly in the instant case, there is a “* * * shadowy relation between the defendant present at such a time and his ability to defend * * *” Thus, along with the general language of the *Snyder* case, the appellee submits that it could well be said a privilege extended at all to the brief view which may have been taken in this case.

It is thus urged that the judgment below should be affirmed so that “* * * gossamer possibilities of prejudice to a defendant” would not “nullify a sentence pronounced by a court of competent jurisdiction in obedience to * * * law, and set the guilty free.”

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney
Chief, Criminal Division,

LEILA F. BULGRIN,
Assistant U. S. Attorney,
Attorneys for Appellees United States of
America.

No. 15933 ✓

**United States
Court of Appeals**
for the Ninth Circuit

LEWIS F. BLAGG,

Appellant,

vs.

IRVING I. BASS, Trustee in Bankruptcy of the
Estate of Lewis F. Blagg, Bankrupt,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California
Central Division**

FILED

JUN 16 1958



No. 15933

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LEWIS F. BLAGG,

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vs.

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Transcript of Record

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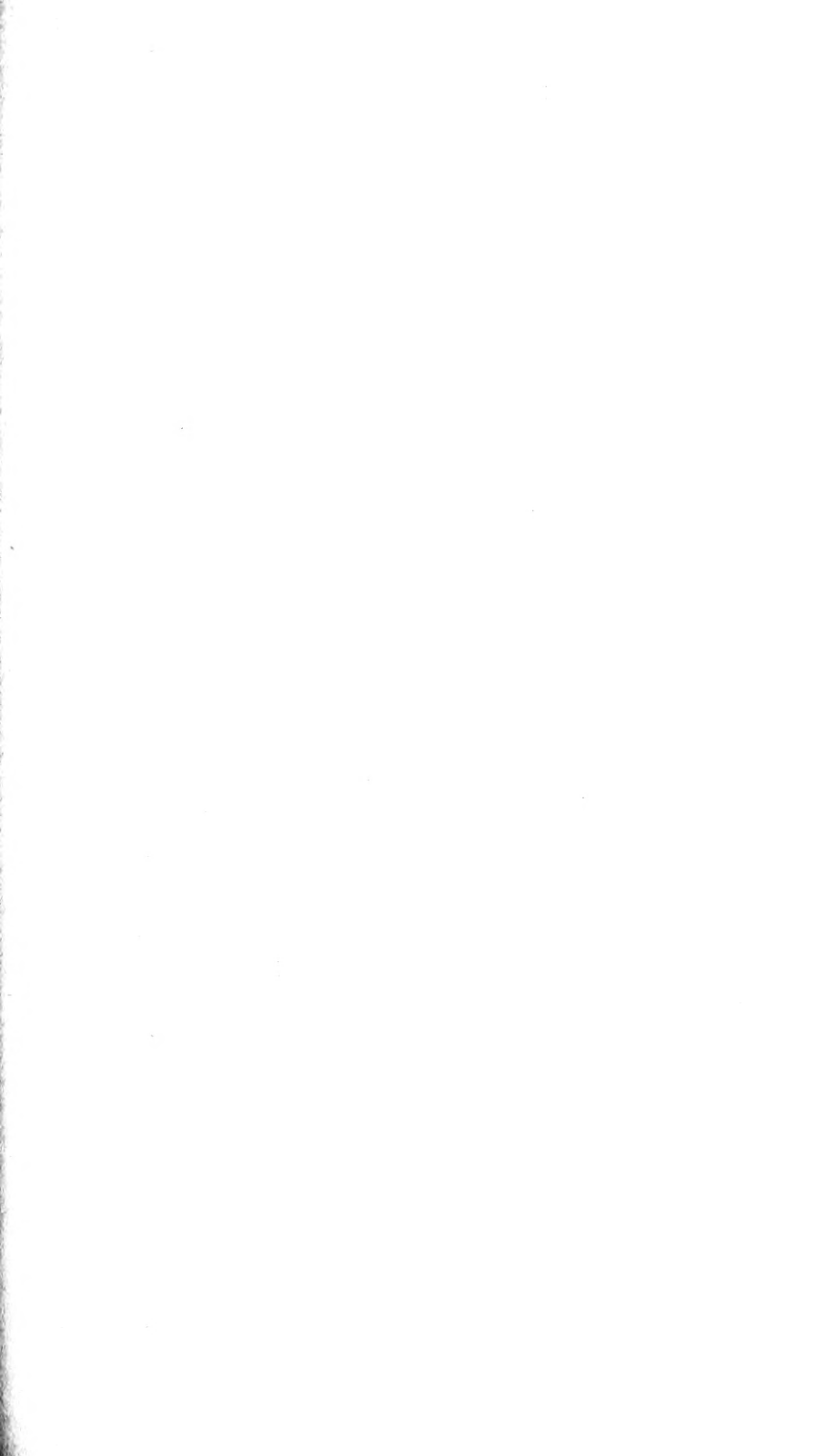


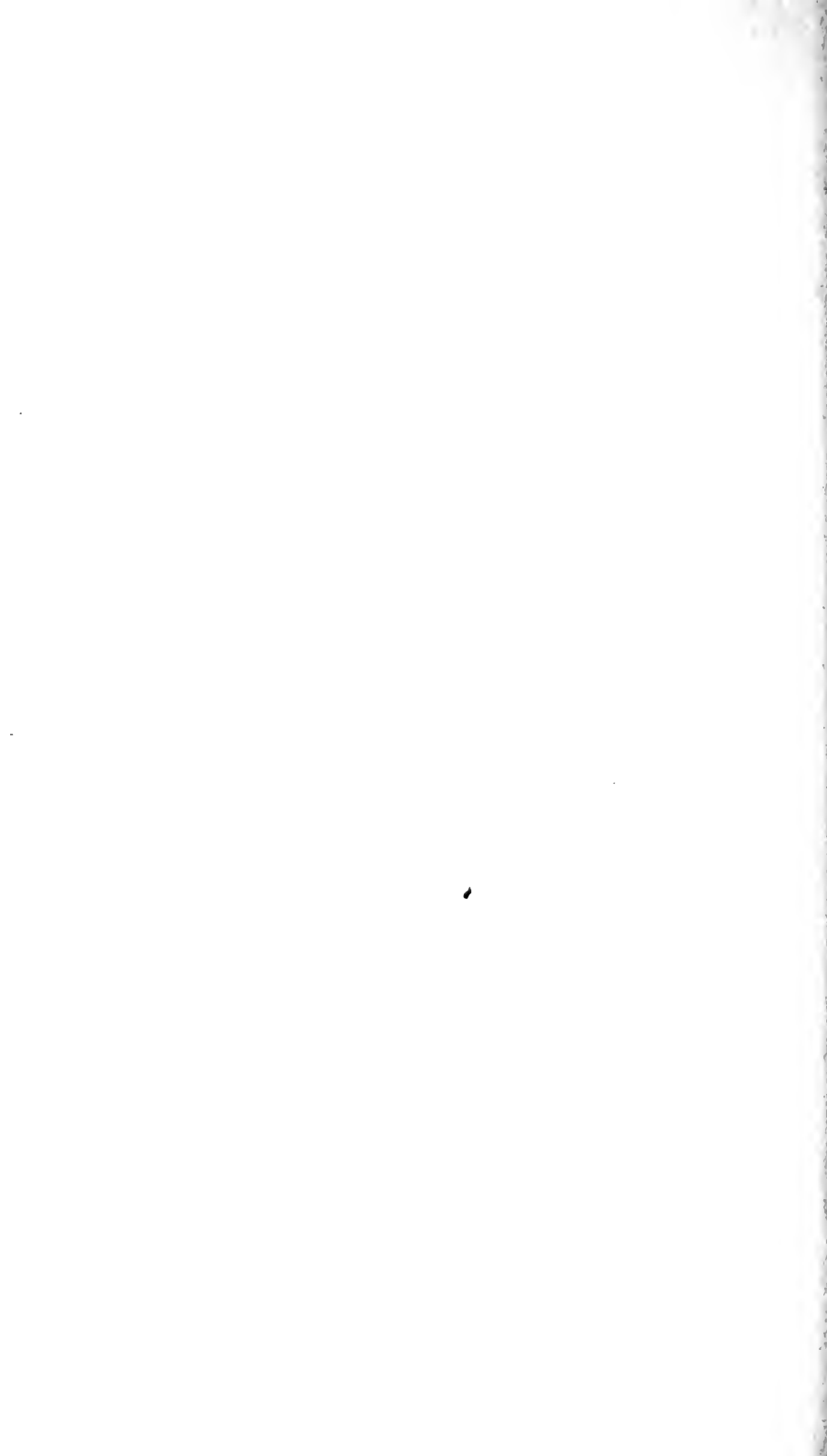
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

MARK F. JONES, JR.,

MAURICE GORDON,

756 So. Broadway,

Los Angeles 14, California.

For Appellee:

C. E. H. McDONNELL,

Suite 925, 548 So. Spring Street,

Los Angeles 13, California.

In the United States District Court for the Southern
District of California, Central Division

In Bankruptcy—No. 75976-HW

In the Matter of

LEWIS F. BLAGG,

Bankrupt.

DEBTOR'S PETITION

To the Honorable Judges of the above-entitled Court:

The Petition of Lewis F. Blagg, Residing at No. 11042 West Hondo Parkway, in the Temple City, County of Los Angeles, State of California, by occupation a general contractor, and engaged in the business of general contracting respectfully represents:

1. Your petitioner has had his principal place of business (has resided, or has had his domicile) at 11042 West Hondo Parkway, Temple City, California, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far

as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said Act.

/s/ LOUIS F. BLAGG,
Signature of Petitioner.

State of California,
County of Los Angeles—ss.

I, Lewis F. Blagg, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

/s/ LOUIS F. BLAGG,
Signature of Petitioner.

Subscribed and sworn to before me December 19,
1956.

[Seal] /s/ MAURICE GORDON,
Notary Public in and for Said
County and State.

Summary of Debts and Assets

(From the Statements of the Debtor in Schedules A and B)

Schedule A 1—a	Wages	\$ 178.80
Schedule A 1—b (1)	Taxes due United States	1,717.54
Schedule A 1—b (2)	Taxes due States	81.31
Schedule A 1—b (3)	Taxes due counties, districts and municipalities	561.60
Schedule A 1—c (1)	Debts due any person, including the United States, having priority by laws of the United States	—
Schedule A 1—c (2)	Rent having priority	—
Schedule A 2	Secured claims	—
Schedule A 3	Unsecured claims	12,448.32
Schedule A 4	Notes and bills which ought to be paid by other parties thereto	—
Schedule A 5	Accommodation paper	—

Schedule A, total \$14,987.57

Schedule B 1	Real estate	\$15,414.29
Schedule B 2—a	Cash on hand	—
Schedule B 2—b	Negotiable and non-negotiable instruments and securities	—
Schedule B 2—d	Household goods	2,000.00
Schedule B 2—e	Books, prints and pictures	100.00
Schedule B 2—f	Horses, cows and other animals	—
Schedule B 2—g	Automobiles and other vehicles	950.00
Schedule B 2—h	Farming stock and implements	—
Schedule B 2—i	Shipping and shares in vessels	—
Schedule B 2—j	Machinery, fixtures and tools	500.00
Schedule B 2—k	Patents, copyrights, trade-marks	—
Schedule B 2—l	Other personal property	250.00
Schedule B 3—a	Debts due on open accounts	—
Schedule B 3—b	Policies of insurance	2,500.00
Schedule B 3—c	Unliquidated claims	—
Schedule B 3—d	Deposits of money in banks and elsewhere	—
Schedule B 4	Property in reversion, remainder, expectancy or trust	—
Schedule B 5	Property claimed as exempt (included above) \$17,900.00	22,314.29
Schedule B 6	Books, deeds and papers	50.00

Schedule B, total \$22,364.29

/s/ LOUIS F. BLAGG,

Signature of Petitioner.

[Endorsed] : Filed December 21, 1956, U.S.D.C.

[Title of District Court and Cause.]

ORDERS OF ADJUDICATION AND OF GENERAL REFERENCE

At Los Angeles, in said District, on December 21, 1956.

The respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposition thereto;

It is adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

It is thereupon ordered that the said proceedings be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings hereinafter mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number: 75976-HW

Title of Proceedings: Lewis F. Blagg.

Filed: December 21, 1956.

Referee: Joseph J. Rifkind, Esq., Los Angeles, California.

.....

United States District Judge.

[Title of District Court and Cause.]

TRUSTEE'S REPORT OF
EXEMPT PROPERTY

To: Honorable Joseph J. Rifkind,
Referee in Bankruptcy:

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid as his own property, under the provisions of the Act of Congress relating to bankruptcy, as his exemptions allowed by law and claimed by him in his schedules filed in the above-entitled proceeding.

Property claimed to be exempt by the laws of the United States with reference to the statute creating the exemption

Property claimed to be exempt by State laws, with reference to the statute creating the exemption.....

General Head	Particular Description	Estimated Value
CCP 690.2	Necessary household goods and furniture and wearing apparel	\$2,000.00
CCP 690.1	Miscellaneous books	\$ 100.00
CCP 690.24	1948 Willys Pick-up truck.....	\$ 150.00

Trustee refuses to exempt and set aside the following items claimed as exempt in the within proceedings:

General Head	Particular Description	Estimated Value
CCP .4	Various tools used in bankrupt's business	\$1,117.50
CCP .1	Office furniture	\$ 385.00
CCC 1260-1261	Homestead on 11042 West Hondo Parkway, Temple City, described as follows: All of Lot 61 and the south-westerly 10 ft. of Lot 62, Tract 11584, as recorded in Book 213/2 and 3 of Maps, in the office of the County Recorder	(Approx.)

of Los Angeles County, California, said property formerly being registered land entered on a memorial certificate M. H. 2129.

Dated this 8th day of April, 1957.

/s/ IRVING I. BASS,
Trustee.

[Endorsed]: Filed April 10, 1957, Referee.

[Title of District Court and Cause.]

OBJECTIONS

To the Honorable Joseph J. Rifkind, Referee in
Bankruptcy:

Comes now Lewis F. Blagg, the above-named bankrupt, by his attorneys, Mark F. Jones, Jr. and Maurice Gordon, and objects to the report of the Trustee herein, filed the 10th day of April, 1957, and served on the bankrupt on the 18th day of April, 1957, setting apart exemptions of the said bankrupt, upon the following grounds and for the following reasons:

I.

Tools and Equipment

The Trustee's refusal to exempt and set apart the items, numbered 16 through 37 set forth on the Inventory on file herein, or any of them, is contrary to and in violation of the provisions of Section 690.4 of the Code of Civil Procedure of the State of California.

II.

Office Furniture and Equipment

The Trustee's refusal to exempt and set apart the items numbered 1 through 15a set forth on the Inventory on file herein, or any of them, is contrary to and in violation of the provisions of Section 690-1 of the Code of Civil Procedure of the State of California.

III.

Homestead

The Trustee's refusal to exempt and set aside to the bankrupt a homestead on the real property located at 11042 West Hondo Parkway, Temple City, California, as more particularly described on Trustee's Report of Exempt Property on file herein, is contrary to and in violation of the provisions of Sections 1260-1261 of the Civil Code of the State of California.

Wherefore, your Objector prays that said Report be not approved.

MARK F. JONES, JR., and
MAURICE GORDON,

By /s/ MAURICE GORDON.

[Endorsed]: Filed April 22, 1957, Referee.

[Title of District Court and Cause.]

MEMORANDUM OPINION RE OBJECTIONS
TO TRUSTEE'S REPORT OF EXEMPT
PROPERTY

Statement of Case

The bankrupt filed his voluntary petition on December 21, 1956, and was adjudicated a bankrupt on that date. Irving I. Bass ever since January 17, 1957, has been and now is the duly appointed, qualified and acting trustee in bankruptcy of the bankrupt estate. The bankrupt in the Debtor's Petition designates himself as a "general contractor." Debts are scheduled as wages \$178.80, taxes due to the United States \$1,717.54, taxes due to the State \$81.31, taxes due to the County, etc. \$561.60, and thirty (30) unsecured creditors of \$12,987.57, or a total of \$14,987.57. Substantially, all of the debts scheduled were contracted by and arise out of the bankrupt's operation as such "general contractor." The assets over and above that claimed as exempt by the bankrupt are negligible.

The trustees filed his report of exempt property on April 10, 1957, in which he refuses "to exempt and set aside (certain) items claimed as exempt" by the bankrupt. These items are: (1) various machinery and equipment used in bankrupt's business as such general contractor, (2) office furniture also used by the bankrupt in such business, and (3) the homestead claimed by the bankrupt as head of a family. The bankrupt filed objections to the trustee's

report of exempt property on April 22, 1957. Counsel for the bankrupt and counsel for the trustee have both ably and thoroughly prepared and presented their respective cases.

* * *

Resume of Facts Relating to Claim of Homestead and Head of Family

The bankrupt's claim to a homestead as head of a family is set forth in Schedule B-5 as follows:

"Homestead on home at 11042 West Hondo Parkway, Temple City; Petitioner's 11-year-old daughter resides with petitioner during the summer months school vacations and petitioner therefore believes he is entitled to the exemption provided by Sections 1260-1261 of the California Civil Code, to wit; \$12,500.00."

The bankrupt's former wife obtained a divorce from the bankrupt in the State of Nevada on May 12, 1955. The findings of fact recite "that the defendant was personally and duly served with process and has not appeared or answered the complaint and that his default has been entered." The decree after granting plaintiff an absolute decree of divorce provides "That the plaintiff herein be, and she hereby is granted the care, custody and control of the minor child, to wit: Roberta Blagg, with the right of reasonable visitation granted to the defendant; that defendant pay to the plaintiff \$20.00 per week for the support, maintenance and education of said minor child." (Bankrupt's Exhibit No. 1.)

A Declaration of Homestead was executed, verified, acknowledged, and recorded by the bankrupt on December 18, 1956, at 9:50 a.m. (Trustee's Ex-

hibit "A".) This declaration recites "Be it known that I, Lewis F. Blagg, a single man, hereby declare that I am at the time of the making of this Declaration actually residing on the premises hereinafter described and claim them as a homestead." This declaration, it will be noted, makes no reference to being the head of a family whatsoever or to Roberta or that he has a minor child residing with him upon the premises who is under his care and maintenance. The bankrupt on the following day executed a Declaration of Abandonment of Homestead which was recorded on December 19, 1956, at 3:36 p.m. (Trustee's Exhibit "B".)

The bankrupt then executed a Declaration of Homestead which was recorded on December 19, 1956, at 3:49 p.m. (Bankrupt's Exhibit 2.) This last declaration recites: "Be it known that I, Lewis F. Blagg, do hereby declare that I am the head of a family, but that I am not married, and that my family consists of myself, and a minor daughter;" the declaration in the second paragraph states "That I am at the time of making this declaration, residing on the premises." It will be noted that the declaration does not state that we or that my minor daughter and I are residing upon the premises at the time of making this declaration. The debtor's petition was verified on December 19, 1956, and filed on December 21, 1956, at 3:30 p.m.

The evidence shows that Roberta first went to live with her maternal grandmother, Mrs. Clara Simms, in the late Spring of 1955, which was shortly before the granting of the divorce on May 12, 1955. Roberta

attended school between the late Spring of 1955 and February 1956 partly in Temple City (Los Angeles County) and partly at Turlock, California, where her maternal grandmother resided. Roberta, however, lived with her grandmother and attended school at Turlock continuously from February 1956 to the end of the semester in June 1956. Roberta apparently spent part of her summer vacation with her father at Temple City. Roberta resumed school at Turlock in September 1956 and has continuously attended school there to date, continuing to live there with her said grandmother.

It is significant that Roberta visits her mother who lives at Kermin, on week ends, a distance of about 125 miles, but that she has never visited her father from September 1956 to date, nor has the bankrupt visited his minor daughter since at least September 1956. In fact, the bankrupt and his minor daughter have not seen each other since at least September 1956, if not longer. The father has contributed very little if anything to the care, maintenance or support of his minor daughter since at least **September, 1956.**

The building which the bankrupt claims is affixed to the land and which the trustee claims is removable and therefore personal property, is a steel frame structure, 100 feet in length and 30 feet in width. This structure rests upon a concrete slab and is attached by anchor bolts to the vertical "H" beams which support the roof or super structure. This building clearly appears to be a fixture under Section 660 of the Civil Code, however, such determination is unnecessary to the disposition of the objections.

The Validity of the Claim of the Bankrupt to a
Homestead as Head of a Family

Section 1261 of the Civil Code of the State of California defines the head of a family as follows:

“(2). Every person who has residing on the premises with him or her, and under his or her care and maintenance * * *

(a). His or her minor child, * * *.”

The bankrupt has never by proceedings in the State of Nevada or by proceedings in the State of California contested, appealed from or in any manner attacked the validity of said decree or the provision therein awarding the custody of the minor child to bankrupt's wife. It is the status of this minor child which forms the basis for the bankrupt's claim to a homestead as the head of a family.

The bankrupt now contends that since the said minor child was not in the State of Nevada when the decree was entered that judgment was and is null and void so far as it attempts and purports to award the plaintiff custody. There is serious doubt as to the bankrupt's right to collaterally attack the decree of divorce rendered in the State of Nevada under Section 1 of Article IV of the Constitution of the United States which provides that “Full faith and credit shall be given in each state to the * * * judicial proceedings of every other State.”

The Court based upon its independent research

has found the case of *Master Lubricants Co. vs. Cook* (9 Cir.) 159 F (2) 679, which is closely analogous to the instant case, in which the court states as follows:

“* * * A default divorce was granted the wife. The wife was awarded custody of a minor daughter, together with an allowance for her support * * * The appellee argues that because there was a minor child, and such child was residing on the premises with her father at the time of, and subsequent to, the final decree of divorce and at the time the petition in bankruptcy was filed, the family relationship necessary for the preservation of the homestead rights continued to be effective.

“(2). Since the custody of the child with support allowance had been granted to the mother, the father, as head of a family owed no further obligation to the child. The daughter was not under the legal custody of the father and was not on the premises with her father under any legal right to insist that she stay there, hence there was no basis for maintaining the homestead, and it was therefore terminated.”

Assuming without conceding, that the Nevada Court lacked jurisdiction to award custody to the mother, it is difficult to conceive of a situation under which a person would be less entitled to claim a homestead as the head of a family than under the facts in the instant case.

Conclusion and Decision

The Court concludes as follows:

1. That the Declaration of Homestead, of the

bankrupt as the head of a family, recorded on December 19, 1956, in Book 53168, Page 389 of Official Records of the County of Los Angeles, State of California, is null, void and of no force or effect.

2. That the bankrupt is not entitled to have set aside to him as exempt the office equipment and the machinery and equipment used by him as a general contractor, being more particularly Items 1 to 15a, inclusive, and Items 16 to 37, inclusive, of the inventory on file herein.

3. That the objections of the bankrupt to the Trustee's Report of Exempt Property be and they are overruled.

4. The attorney for the trustee will prepare, serve, and submit Findings of Fact, Conclusions of Law and Order, in conformity with the opinion and decision herein, as approved by Rule 7 of the District Court.

Dated: July 17, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed July 17, 1957, Referee.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW RE OBJECTIONS TO TRUSTEE'S
REPORT OF EXEMPT PROPERTY

This matter having come on for hearing on the objections of Lewis F. Blagg, bankrupt, to the report

of exempt property of Irving I. Bass, Trustee in the above-captioned bankruptcy proceedings, on May 8, 1957, at the hour of 2:00 p.m. thereof; and the objector having appeared and been represented by his counsel, Mark F. Jones & Maurice Gordon, by Maurice Gordon, and the trustee having appeared by and been represented through his attorney, C. E. H. McDonnell; and evidence both oral and documentary having been offered and received; and the Referee having been fully advised in the premises now makes his Findings of Fact and Conclusions of Law based thereon.

Findings of Fact

I.

The bankruptcy proceedings of Lewis F. Blagg were commenced by the filing of a voluntary petition in bankruptcy on December 21, 1956. On January 17, 1957, a first meeting of creditors was held in the said proceedings. Irving I. Bass was elected trustee at the first meeting of creditors, immediately qualified, and ever since has been the duly appointed, qualified and acting trustee in these bankruptcy proceedings.

II.

On April 10, 1957, the trustee filed his "Report of Exempt Property" in which he refused to exempt or set aside various machinery, equipment and tools used in the bankrupt's business, office furniture and a homestead on real property commonly known and designated as 11042 West Hondo Parkway, Temple

City, California, and more particularly described as follows:

All of Lot 61 and the southwesterly 10 ft. of Lot 62, Tract 11584, as recorded in Book 213/2 and 3 of Maps, in the office of the County Recorder of Los Angeles County, California, said property formerly being registered land entered on a memorial certificate M. H. 2129.

III.

On April 22, 1957, the bankrupt filed his "Objections" to the trustee's report of exempt property claiming the tools and equipment to be exempt under the provisions of CCP 690.4 and Bankruptcy Act Section 6 (11 U.S.C. Sec. 24), the office furniture and equipment to be exempt under CCP 690.1 and Bankruptcy Act Section 6 (11 U.S.D. Sec. 24), and the homestead to be exempt to the extent of \$12,500.00 under CCC 1260-1261 (incl.) and Bankruptcy Act Section 6 (11 U.S.C. Sec. 24).

IV.

The bankrupt was at all times from 1946, to December 21, 1956, engaged in business as a steel fabricating contractor, employing numerous employees therein for the accomplishment of prefabricating, assembling and erecting steel structures on contracts obtained by the bankrupt through competitive bidding.

V.

The tools, machinery and equipment claimed exempt by the bankrupt were used by those employed

by the bankrupt in connection with the business of the bankrupt as a steel fabricating contractor and were of a reasonable value of \$1,117.50.

VI.

The furniture and equipment claimed by the bankrupt as exempt under CCP 690.1 consisted of tables, chairs, a desk, filing cabinets and miscellaneous equipment used in and for the conduct of the business of the bankrupt as a steel fabricating contractor; none of this furniture and equipment was used in, or is necessary for, the home or household of the bankrupt.

VII.

From at least September, 1956, to and including May 8, 1957, the date of the hearing herein, Roberta Blagg, the minor daughter of the bankrupt herein, has not resided with her father, Lewis F. Blagg, upon the premises claimed as homeland as the head of a family located at 11042 West Hondo Parkway, Temple City, California, but, on the contrary, the care, custody and control of said minor child has by judicial decree been awarded to her mother and she has during all of such period resided with her maternal grandmother and the bankrupt has not supported or maintained said minor child during said period.

Conclusions of Law

I.

The items of office furniture and equipment are not exempt under the provisions of CCP 690.1.

II.

The bankrupt was not on January 21, 1957, a mechanic or artisan and is not entitled to claim the various items of machinery, equipment and tools exempt under the provisions of CCP 690.4.

III.

On December 19, 1956, the bankrupt was not head of a family and the homestead on the property located at 11042 West Hondo Parkway, Temple City, California, is null, void and of no force or effect.

IV.

The homestead filed by the bankrupt on December 19, 1956, was null and void and of no effect as to this bankrupt estate or the trustee in bankruptcy thereof.

Dated: August 12, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

Affidavit of Service by Mail attached.

Received August 2, 1957.

[Endorsed]: Filed August 12, 1957, Referee.

[Title of District Court and Cause.]

ORDER ON OBJECTIONS TO TRUSTEE'S
REPORT OF EXEMPT PROPERTY

This matter having come on for hearing on the objections of Lewis F. Blagg, bankrupt, to the re-

port of exempt property of Irving I. Bass, trustee in bankruptcy, on May 8, 1957, at the hour of 2:00 p.m. thereof; and the objector having appeared and been represented by his counsel, Mark F. Jones & Maurice Gordon, by Maurice Gordon, and the trustee having appeared by and been represented through his attorney, C. E. H. McDonnell; and the court having entered its findings of fact and conclusions of law on the issues presented in this matter; and the Referee being otherwise fully advised in the premises,

Now, Therefore, It Is Ordered as follows:

1. That the report of the trustee of exempt property be and the same hereby is allowed and confirmed.

2. The objections of Lewis F. Blagg to the trustee's report of exempt property be and the same hereby are overruled.

3. That certain homestead filed herein by the bankrupt on December 19, 1956, being document number 2862, in Book 53155, page 127, official records of the County Recorder, Los Angeles County, California, on real property commonly known and designated as 11042 West Hondo Parkway, Temple City, California, and more particularly described as follows:

All of Lot 61 and the southwesterly 10 ft. of Lot 62, Tract 11584, as recorded in Book 213/2 and 3 of Maps, in the office of the County Recorder of Los Angeles County, California, said property formerly being registered land entered on a memorial certificate M. H. 2129.

is null, void and of no force or effect and the bankrupt has no right, title or interest therein or claim thereon by reason of the said destination of homestead or otherwise or at all and said real property and all of the infringements thereon constitutes an asset of the bankrupt estate herein.

* * *

Dated: August 12, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed August 12, 1957, Referee.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To Honorable Joseph J. Rifkind, Referee in Bankruptcy:

The Petition of Lewis F. Blagg respectfully represents:

1. Your petitioner is the bankrupt in the above-entitled matter.

2. On August 12, 1957, your Honor entered an Order herein, wherein the Report of the Trustee of Exempt Property was allowed and confirmed, in which Report the Trustee refused to exempt and set aside a homestead claimed as exempt by the Petitioner and in which Petitioner's objections to said report were overruled and the homestead filed by

petitioner on December 19, 1956, covering the real property, more particularly described as:

All of Lot 61 and the southwesterly 10 ft. of Lot 62, Tract 11584, as recorded in Book 213/2 and 3 of Maps, in the office of the County Recorder of Los Angeles County, California, said property formerly being registered land entered on a memorial certificate M. H. 2129, was declared to be null, void and of no force or effect, and that petitioner has no right, title or interest therein or claim thereon by reason of the said Declaration of Homestead or otherwise or at all, and said real property and all of the improvements thereon constitute an asset of the bankrupt estate; said Order being based upon a Finding that petitioner's minor daughter had not resided upon the premises claimed as a homestead by the petitioner as the head of a family, since September of 1956 to and including May 8, 1957, and that the care, custody and control of said minor child had by judicial decree been awarded to the mother (Finding No. VII), and the Conclusion of Law that petitioner was not the head of a family and that the Homestead on the property involved is null, void and of no force or effect (Conclusion No. III).

3. That said Order, Finding and Conclusion of Law with respect to the homestead are erroneous in this,

a. That the Finding that Petitioner's minor daughter, Roberta, was not residing with petitioner at his home on the premises above described and that said minor was not under his care and mainte-

nance is not supported by and is contrary to the evidence;

b. That the Conclusion of Law that petitioner on December 19, 1956, was not the head of a family is contrary to the Rule of Law which holds that the father of a minor child is the head of a family and is entitled to a homestead as such head of a family even though the minor child is not physically residing upon the premises at the time of the filing of the homestead.

Wherefore, your petitioner prays that your Honor certify to the Judge of this Court, and transmit to the Clerk the records in said proceedings, having to do with, or in any manner bearing upon, the Order aforesaid, as provided in Section 39 of the Bankruptcy Act.

/s/ LEWIS F. BLAGG,
Petitioner.

MARK F. JONES, JR., and
MAURICE GORDON,
By /s/ MAURICE GORDON,
Attorneys for Petitioner.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 16, 1957, Referee.

[Title of District Court and Cause.]

NOTICE OF FILING CERTIFICATE
ON REVIEW

To: Mark F. Jones, Jr., and Maurice Gordon, Attorneys for Bankrupt.

C. E. H. McDonnell, Attorney for Trustee in
Bankruptcy:

Notice is hereby given that the undersigned Referee in Bankruptcy has this date filed with the clerk of the above-entitled court his Certificate on Review of the Order dated August 12, 1957.

Rule 204 (d) of the court provides that the reviewing party, within ten (10) days after the mailing of the notice of the filing of the certificate on review, shall serve upon the respondent and file with the clerk in duplicate a memorandum of points and authorities, and that the respondent shall in like manner, serve and file a reply memorandum of points and authorities within five (5) days thereafter.

Dated: September 6, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed September 6, 1957, Referee.

[Title of District Court and Cause.]

CERTIFICATE ON REVIEW

To: Hon. Harry C. Westover, United States District Judge:

The undersigned, Joseph J. Rifkind, Referee in Bankruptcy of the above-entitled court, does hereby certify as follows:

Statement of Case

The bankrupt filed a Petition for Review on August 16, 1957, from the order of the undersigned Referee in Bankruptcy entered on August 12, 1957, approving the Trustee's Report of Exempt Property. The trustee in said report refused to set aside certain real property to the bankrupt which he claims as a homestead as the head of a family.

Summary of Evidence

The bankrupt filed his voluntary petition on December 21, 1956, and was adjudicated a bankrupt on that date. Irving I. Bass ever since January 17, 1957, has been and now is the duly appointed, qualified and acting trustee in bankruptcy of the bankrupt estate. The bankrupt in the Debtor's Petition designates himself as a "general contractor." Debts are scheduled as wages \$178.80, taxes due to the United States \$1,717.54, taxes due to the State \$81.31, taxes due to the County, etc., \$561.60, and thirty (30) unsecured creditors of \$12,448.32, or a total of \$14,987.57. Substantially, all of the debts scheduled were contracted by and arise out of the bankrupt's operation as such "general contractor." The assets over and above that claimed as exempt by the bankrupt are negligible.

The trustee filed his report of exempt property on April 10, 1957, in which he refuses "to exempt and set aside (certain) items claimed as exempt" by the bankrupt. These items are: (1) Various machinery and equipment used in bankrupt's business

as such general contractor, (2) office furniture also used by the bankrupt in such business, and (3) the homestead claimed by the bankrupt as head of a family. The bankrupt filed objections to the Trustee's Report of Exempt Property on April 22, 1957. The Referee in Bankruptcy overruled the objections and approved the Trustee's Report of Exempt Property. The Petition for Review is only from that portion of the order which holds that the Declaration of Homestead of the bankrupt as the head of a family is void.

The bankrupt's former wife obtained an absolute and final decree of divorce from the bankrupt in the State of Nevada on May 12, 1955. The findings of fact in the decree recite "that the defendant was personally and duly served with process and has not appeared or answered the complaint and that his default has been entered." The decree after granting plaintiff an absolute decree of divorce provides, "That the plaintiff herein be, and she hereby is granted the care, custody and control of the minor child, to wit: Roberta Blagg, with the right of reasonable visitation granted to the defendant; that defendant pay to the plaintiff \$20.00 per week for the support, maintenance and education of said minor child." (Bankrupt's Exhibit 1.)

A Declaration of Homestead was executed, verified, acknowledged, and recorded by the bankrupt on December 18, 1956, at 9:50 a.m. (Trustee's Exhibit "A.") This declaration recites: "Be it known

that I, Lewis F. Blagg, a single man, hereby declare that I am at the time of the making of this Declaration actually residing on the premises hereinafter described and claim them as a homestead." This declaration makes no reference to the bankrupt being the head of a family or to his minor daughter, Roberta, or that said minor child, Roberta, was residing with him upon the premises or that said minor daughter, Roberta, was under his care and maintenance. The bankrupt on the following day executed a Declaration of Abandonment of Homestead which was recorded on December 19, 1956, at 3:36 p.m. (Trustee's Exhibit "B.")

The bankrupt then executed a Declaration of Homestead which was recorded on December 19, 1956, at 3:49 p.m. (Bankrupt's Exhibit No. 2.) This last declaration recites, "Be it known that I, Lewis F. Blagg, do hereby declare that I am the head of a family, but that I am not married, and that my family consists of myself and a minor daughter"; the declaration in the second paragraph states, "That I am at the time of making this declaration, residing on the premises." The declaration does not state that the bankrupt and minor daughter are residing upon the premises at the time of making the declaration. The debtor's petition was verified on December 19, 1956, and filed on December 21, 1956, at 3:30 p.m.

The evidence shows that Roberta first went to live with her maternal grandmother, Mrs. Clara Sims, in the late Spring of 1955, which was shortly before the granting of the divorce to her mother

on May 12, 1955. Roberta attended school between the late Spring of 1955 and February, 1956, partly in Temple City (Los Angeles County) and partly at Turlock, California, where her maternal grandmother resided. Roberta, however, lived with her grandmother and attended school at Turlock continuously from February, 1956, to the end of the semester in June, 1956. Roberta apparently spent part of her 1956 summer vacation with her father at Temple City. Roberta resumed school at Turlock in September, 1956, and has continuously attended school there to date, continuing to live there with her said maternal grandmother who has supported and maintained her granddaughter, Roberta, while living with her.

Roberta visits her mother who lives at Kermin on week ends, a distance of about 125 miles, but she has not visited her father from September, 1956, to date, nor has the bankrupt visited his minor daughter from at least September, 1956, to the date of the hearing. The bankrupt and his minor daughter have not seen each other since from at least September, 1956, if not longer. The father has contributed very little if anything to the care, maintenance or support of his minor daughter since at least September, 1956.

Order of Referee in Bankruptcy

The findings of fact and conclusions of law were signed on August 12, 1956. The order from which the review has been taken was signed on August 12, 1956.

Questions Presented on Review

The Petition for Review asserts that the findings of fact, conclusions of law and the order are erroneous in the following particulars, to wit:

a. That the Finding that Petitioner's minor daughter, Roberta, was not residing with petitioner at his home on the premises above described and that said minor was not under his care and maintenance is not supported by and is contrary to the evidence;

b. That the Conclusion of Law that petitioner on December 19, 1956, was not the head of a family is contrary to the rule of law which holds that the father of a minor child is the head of a family and is entitled to a homestead as such head of a family even though the minor child is not physically residing upon the premises at the time of the filing of the homestead.

Documents Transmitted

There are transmitted with this Certificate on Review the following:

1. Debtor's petition with schedule of assets and liabilities attached thereto, filed December 21, 1956.
2. Trustee's Report of Exempt Property filed April 10, 1957.
3. Objections to Report of Exempt Property filed April 22, 1957.
4. Bankrupt's Exhibits 1 and 2.
5. Trustee's Exhibits A and B.
6. Memorandum Opinion filed July 17, 1957.
7. Findings of Fact and Conclusions of Law

filed August 12, 1957.

8. Order dated August 12, 1957.

9. Petition for Review filed August 16, 1957.

10. Transcript of hearing on May 8, 1957.

11. Notice of Filing Certificate on Review dated September 6, 1957.

Dated: September 6, 1957.

Respectfully transmitted,

/s/ JOSEPH J. RIFKIND,

Referee in Bankruptcy.

[Endorsed]: Filed September 6, 1957, U.S.D.C.

[Title of District Court and Cause.]

ORDER SUSTAINING REFEREE ON REVIEW

This matter having come on for hearing on the verified petition for review of Lewis F. Blagg to review the order of the Honorable Joseph J. Rifkind, Referee in the above-captioned bankruptcy, of August 12, 1957, allowing the trustee's report of exempt property on the 16th day of December, 1957, at the hour of 3:00 p.m. thereof; and the petitioner, Lewis F. Blagg, having appeared by and was represented through his counsel, Mark F. Jones, Jr., and Maurice Gordon, by Mark F. Jones, Jr., and the respondent, Irving I. Bass, trustee in the above-captioned bankruptcy, having appeared by and was represented through his counsel, C. E. H. McDonnell; and it appearing that memorandums of points and authorities having been filed herein and argu-

ment having been made; and the court being otherwise fully advised in the premises,

Now, Therefore, It Is Ordered that the petition for review of Lewis F. Blagg be and the same hereby is denied, and the order of the Referee allowing the trustee's report of exempt property be and the same hereby is confirmed; and

It Is Further Ordered that the findings of fact, conclusions of law on which the said order of the Referee was founded be and the same hereby are adopted.

Dated: 1/14/58.

/s/ HARRY C. WESTOVER,
U. S. District Court Judge.

Approved as to Form:

MARK F. JONES, JR., and
MAURICE GORDON,
By /s/ MAURICE GORDON,
Attorneys for Petitioner.

/s/ C. E. H. McDONNELL,
Attorney for Trustee.

[Endorsed]: Filed and entered January 14, 1958.

[Title of District Court and Cause.]

NOTICE OF ENTRY

MARK F. JONES, JR., and
MAURICE GORDON, ESQS.,
756 South Broadway,
Los Angeles 14, Calif.

C. E. H. McDONNELL, ESQ.,
548 South Spring St.,
Los Angeles 13, Calif.

Re: Lewis F. Blagg, Bankrupt, No. 75976-HW.

You are hereby notified that order sustaining Referee on review in the above-entitled case has been entered this day in the docket.

Dated: January 14, 1958.

CLERK, U. S. DISTRICT
COURT,

By C. A. SIMMONS,
Deputy Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Lewis F. Blagg, the above-named Bankrupt, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the Order of the District Court for the Southern District of California, Central Division, sustaining and confirming that portion of

the Order of the Honorable Joseph J. Rifkind, Referee in Bankruptcy, approving the Trustee's Report of Exempt Property pertaining to the claim of exemption of a homestead by the above-named bankrupt.

Dated: February 11, 1958.

MARK F. JONES, JR., and
MAURICE GORDON,

By /s/ MAURICE GORDON,
Attorneys for the Bankrupt-
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 11, 1958.

[Title of District Court and Cause.]

POINTS TO BE RELIED UPON
ON APPEAL

To: The Clerk of the Above-Entitled Court, and
to Irving I. Bass, Trustee in Bankruptcy, and
to Christopher E. H. McDonnell, His Attorney:

* * *

The Points upon which the Appellant intends to
rely on Appeal are:

1. That the District Court erred in sustaining
and confirming the Order of the Referee, whereby
the homestead recorded by the appellant was held
to be null and void and of no force or effect, and

that the bankrupt has no right, title or interest in the home covered by the homestead;

2. That the Findings, Conclusions of Law and the Order of the Referee are and were erroneous in that the Finding that Appellant's minor daughter was not residing with appellant on the premises covered by the homestead and that said minor child was not under his care and maintenance, is not supported by and is contrary to the evidence;

3. That the Referee's Conclusion of Law that appellant on December 19, 1956, was not the head of a family, is contrary to law.

Dated: February 11, 1958.

MARK F. JONES, JR., and
MAURICE GORDON,
By /s/ MAURICE GORDON,
Attorneys for Bankrupt-
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 11, 1958, U.S.D.C.

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy—No. 75976-HW

In the Matter of:

LEWIS F. BLAGG,

Bankrupt.

Before the Honorable Joseph J. Rifkind, Referee
in Bankruptcy.

TRANSCRIPT OF PROCEEDINGS

Hearing on Bankrupt vs. Trustee Re: Objections
to Trustee's Report of Exempt Property,
Wednesday, May 8, 1957, at 2:00 O'clock p.m.

Appearances:

For the Trustee:

C. E. H. McDONNELL.

For the Bankrupt:

MAURICE GORDON and

MARK F. JONES, By

MAURICE GORDON, ESQ.

* * *

LEWIS F. BLAGG

called as a witness in his own behalf, being first
duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gordon:

Q. Mr. Blagg, you are the bankrupt in these [4*]
proceedings? A. Yes, sir.

*Page numbering appearing at top of page of original Reporter's
Transcript of Record.

(Testimony of Lewis F. Blagg.)

Q. I am going to direct some questions to you in connection with your home. You live at 11042 West Hondo Parkway, Temple City. Is that correct? A. Yes.

Q. Does that property stand in your name?

A. Yes.

Q. How long have you lived there, Mr. Blagg?

A. Approximately 17 years.

Q. Are you presently married?

A. No, sir.

Q. When were you divorced, if you were divorced? A. Somewhere in 1955.

Q. What was your wife's name?

A. Isabelle.

Q. Where did that divorce take place?

The Referee: Pardon me, how long ago was that divorce?

The Witness: 1955.

Q. (By Mr. Gordon): Where did the divorce proceedings take place, Mr. Blagg?

A. I believe it was Reno, Nevada.

Q. Do you know that it was in the State of Nevada?

A. Yes, sir, because I got the certificate from them. [5]

Q. Who obtained the divorce, you or Mrs. Blagg? A. Mrs. Blagg.

Mr. Gordon: For the purpose of the record would you stipulate the divorce was obtained in the State of Nevada in proceeding No. 20,136, entitled Isabelle T. Blagg vs. Lewis F. Blagg, and that the

(Testimony of Lewis F. Blagg.)

decree of divorce was rendered on May 12, 1955? I have a certified copy of that.

Mr. McDonnell: I think it would be easier if we put the decree into evidence.

Mr. Gordon: Very well. We offer the decree of divorce that I have just recited into evidence as Objector's No. 1.

The Referee: Very well, the document will be received in evidence as Bankrupt's Exhibit No. 1.

BANKRUPT'S EXHIBIT No. 1

In the First Judicial District Court of the State
of Nevada, in and for the County of Ormsby

No. 20,136

ISABEL T. BLAGG,

Plaintiff,

vs.

LEWIS F. BLAGG,

Defendant.

RICHARD L. WATERS, JR.,

Attorney for Plaintiff.

FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE

This Cause coming on regularly to be heard this day before the Court, without a jury, plaintiff being personally present in Court and represented by her attorney, Richard L. Waters, Jr., Esq., and it appearing that defendant was personally and

(Testimony of Lewis F. Blagg.)

duly served with process and has not appeared or answered the complaint and that his default has been entered, witnesses having been sworn, testimony given, and the Court having considered the same upon submission of the cause, does now find and conclude:

Findings of Fact

That all of the allegations of plaintiff's complaint are true.

Conclusions of law

From the foregoing the Court concludes that plaintiff is entitled to the relief prayed for in her complaint.

It Is Therefore Ordered, Adjudged and Decreed

1. That plaintiff be and she hereby is granted an absolute decree of divorce forever dissolving the bonds of matrimony now and heretofore existing between plaintiff and defendant and restoring each of the said parties to the status of a single person.

2. That the plaintiff herein be, and she hereby is granted the care, custody and control of the minor child, to wit: Roberta Blagg, with the right of reasonable visitation granted to the defendant; that defendant pay to the plaintiff \$20.00 per week for the support, maintenance and education of said minor child.

3. That the use of the former name of the plaintiff, to wit: Isabel T. Travers, be, and the same hereby is restored to her.

(Testimony of Lewis F. Blagg.)

Done in open court this 12th day of May, 1955.

/s/ JOHN F. SEXTON,
District Judge.

State of Nevada,
County of Ormsby—ss.

I, Geraldine Lamb, County Clerk of Ormsby County, State of Nevada, and ex officio Clerk of the District Court, in and for the County of Ormsby, do hereby certify that the foregoing is a full, true and correct copy of the original Findings of Fact, Conclusions of Law, Judgment and Decree in the action No. 20,136 entitled: Isabel T. Blagg, Plaintiff, vs. Lewis F. Blagg, Defendant, which now remains on file and of record in my office in said Carson City, in said County.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at Carson City, in said County and State, this, 12th day of May, A.D. 1955.

[Seal] /s/ GERALDINE LAMB,
Clerk.

[Endorsed]: Filed May 12, 1955.

[Endorsed]: Filed May 8, 1957, Referee.

Q. (By Mr. Gordon): Mr. Blagg, were you present in the State of Nevada at the time the divorce matter came up for hearing? A. No.

Q. Were any of your children physically pres-

(Testimony of Lewis F. Blagg.)

ent in the State of Nevada at the time the divorce decree was rendered? A. No, sir.

Q. With particular reference to Roberta, was she present in the State of Nevada at that time?

A. No. [6]

Q. Had she ever been in the State of Nevada, as far as you know, in the year of 1955?

A. No, sir.

Q. How old is Roberta? A. 12.

Q. Is she presently 12? A. Yes, about.

Q. Were you represented by counsel in the State of Nevada in these divorce proceedings in May of 1955? A. I was represented by counsel here.

Q. Did counsel in Nevada represent you at the divorce proceedings?

A. Not that I know of; no, sir.

Q. Mr. Blagg, you have other children, do you not? A. Yes.

Q. Besides Roberta? A. Two.

Q. (By the Referee): What are their names and ages?

A. Ann Blagg or Ann Bowman now.

Q. How old is she? A. 18.

Q. How long has she been married?

A. Since somewhere in Septemer, as far as I can recollect.

Q. Of last year? A. Yes, sir. [7]

The Referee: You might proceed.

Q. (By Mr. Gordon): And the name of the other child? A. Frances Louise.

Q. What is her last name? A. Vincent.

(Testimony of Lewis F. Blagg.)

Q. (By the Referee): How old is she?

A. 23.

Q. How long since she has been married?

A. She was married somewhere around June of 1955.

The Referee: Thank you. You may proceed.

Q. (By Mr. Gordon): Mr. Blagg, at the time you filed your homestead, which I believe was on December 19, 1956—pardon me, do you have that homestead, Mr. McDonnell?

Mr. McDonnell: Yes.

Mr. Gordon: Do you mind if we put that into evidence?

Mr. McDonnell: I will stipulate it may go in.

Mr. Gordon: May the document entitled, "Declaration of Homestead" be put into evidence as Bankrupt's next in order?

The Referee: It will be received in evidence as Bankrupt's Exhibit No. 2.

BANKRUPT'S EXHIBIT No. 2

Declaration of Homestead

Be It Known That I, Lewis F. Blagg, do hereby declare that I am the head of a family, but that I am not married, and that my family consists of myself and a minor daughter;

That I am, at the time of making this declaration, residing on the premises hereinafter described, and that I claim said premises as a homestead.

The premises so claimed by me consist of the

(Testimony of Lewis F. Blagg.)

real property situated in Temple City, County of Los Angeles, State of California, and described as follows:

All of Lot 61 and the southwesterly 10 feet of Lot 62, Tract 11584, as recorded in Book 213, Pages 2 and 3 of Maps, in the office of the county recorder of said county and state, said property formerly being registered land entered on a memorial certificate M.H. 2129.

The improvements on said real property consist of a 10 room residence and a converted garage, plus a structural steel building 30 feet by 80 feet in area and a steel frame building 25 feet by 50 feet in area. That I estimate the cash value of said land and premises to be the sum of \$30,000.00.

That a prior Declaration of Homestead has been heretofore abandoned by me, by a Declaration of Abandonment.

In Witness Whereof, I hereunto set my hand this 19th day of December, 1956.

/s/ LEWIS F. BLAGG.

State of California,
County of Los Angeles—ss.

Lewis F. Blagg, being first duly sworn, deposes and says: That he has read the foregoing Declaration of Homestead and that all of the facts therein stated are true.

/s/ LEWIS F. BLAGG.

(Testimony of Lewis F. Blagg.)

Subscribed and sworn to before me this 19th day of December, 1956.

[Seal] /s/ MAURICE GORDON,
Notary Public.

State of California,
County of Los Angeles—ss.

On the 19th day of December, 1956, before me, a notary public in and for said county and state, personally appeared Lewis F. Blagg, known to me to be the person whose name is subscribed to the foregoing instrument, and he acknowledged to me that he executed the same.

In Witness Whereof, I hereunto set my hand and seal the day and year first above written.

[Seal] /s/ MAURICE GORDON,
Notary Public in and for Said
County and State.

[Endorsed]: Filed May 8, 1957, Referee.

Q. (By Mr. Gordon): Mr. Blagg, at the time the Declaration of Homestead was filed, namely, December 19, 1956, who was living with you at your residence at 11042 West Hondo Parkway, Temple City? [8]

Mr. McDonnell: To which I will object as calling for a conclusion of the witness. The fact of whether or not anybody was living with him would be a conclusion for the Court to draw from the circumstances.

(Testimony of Lewis F. Blagg.)

The Referee: The objection is sustained.

I think you can bring out what you want to bring out without asking for a direct conclusion of the witness. After all, that is the province of the Court to determine that.

Q. (By Mr. Gordon): Who was residing with you on the premises?

Mr. McDonnell: I will object to that question, too, on the ground that it calls for the conclusion of the witness as to whether or not anybody was residing with him on the premises. The facts of the matter can be brought out——

The Referee: The objection is sustained.

Mr. Gordon: If the Court please, residing is both a question of fact and a question of law. The question, if I understand counsel's objection at all, is who was actually present upon the property.

The Referee: I think you can develop what you want to without asking a question that calls for a conclusion.

Q. (By Mr. Gordon): Mr. Blagg, with respect to any of your children—with respect particularly to Roberta, where was her home in the year 1956, any time [9] in the year 1956?

A. Well, this property has been her home.

Q. Sir?

A. This property has been her home here.

Q. This property on West Hondo Parkway?

A. Yes.

Q. Where was her home on December 19, 1956?

A. Well, it would still be her home.

(Testimony of Lewis F. Blagg.)

Q. She was physically present on the premises on December 19, 1956, was she? A. No, sir.

Q. Was she physically present on the premises, say, from June to September of 1956?

A. Yes, sir.

The Referee: Give me those dates again?

Mr. Gordon: Between June and September, 1956.

Q. After September, 1956, Mr. Blagg, where was the physical presence of Roberta?

A. At her grandmother's in Turlock.

Q. In what city? A. Turlock.

Q. Turlock, California? A. Yes.

Q. What was she doing there?

A. Going to school.

Q. Was she there by your arrangement or otherwise? [10]

Mr. McDonnell: I will object to that question, your Honor, on the ground that it calls for a hearsay answer.

The Referee: The objection is sustained.

Q. (By Mr. Gordon): Did you send her to Turlock, Mr. Blagg? A. Yes.

Q. For what reason?

A. The school is smaller up there, and we thought that she would get along better and get away from this situation that we had here for awhile.

Q. To what situation are you referring?

A. The divorce proceedings and so forth.

(Testimony of Lewis F. Blagg.)

The Referee: What daughter are we talking about now?

Mr. Gordon: Roberta, the 12-year-old daughter.

Q. Was Mrs. Blagg then residing on the premises in December of 1956? A. No, sir.

Q. How long prior to that date had she left the premises?

A. Approximately Christmas time of 1954.

Q. Had you and Mrs. Blagg then in effect separated, Mr. Blagg? A. Yes.

Q. Where was Mrs. Blagg from December of 1954, on? A. I don't know. [11]

Q. Were you in communication with her?

A. Partially, by some gasoline bills.

Q. But no direct communication?

A. No, sir.

Q. As a matter of fact, Mrs. Blagg had just left the premises and left you and the children there. Is that correct? A. Yes, that is right.

Q. Which children were there at that time?

A. All three of them.

Q. When did you say your eldest daughter married? A. June something in 1955.

Q. Subsequent to the time Mrs. Blagg——

A. In 1956, pardon me.

Q. What is the name of your eldest daughter?

The Referee: Frances Louise Vincent.

The Witness: She was married in June of 1956.

Q. (By Mr. Gordon): Did she marry shortly before Ann, is that what you mean?

A. Yes.

(Testimony of Lewis F. Blagg.)

Q. That would be the same year, then?

A. Yes.

Q. Then she lived on the premises until she married? A. Yes.

Q. Did she live on the premises beyond that date?

A. Just a few days—a week, something of [12] that sort.

Q. Ann, the second eldest daughter, she lived on the premises, too, at the time Mrs. Blagg left?

A. Yes.

Q. And she continued to live there until when?

A. I don't know. I guess it was after Christmas.

Q. Of what year? A. 1956.

The Referee: Did she continue to live there then for several months after she was married?

The Witness: Yes.

Q. (By Mr. Gordon): When did you learn, Mr. Blagg, that Ann had married?

A. Approximately the time these papers were taken out.

Q. By "these papers," you mean the homestead?

A. Yes.

Q. What were the circumstances of your learning that?

A. Well, I think I gave you to understand she was 17, and I said I would check up on it, so I called the house and found out she was 18, and you said that would change the papers somewhat to make them legal.

Q. You mean change the homestead papers?

(Testimony of Lewis F. Blagg.)

A. Yes.

Q. Can you give us Ann's birth date? [13]

A. I believe it is September 14th.

Q. On September 14, 1956, how old was she?

A. I arrived at it later when I called, but I said she was 17 at that time.

Q. But she was actually what, 18?

A. Yes.

Q. When had she married?

A. A short while previous to that time.

Q. You mean before she reached the age of 18, or after?

A. I never questioned her too closely, but approximately at that time.

Q. And you learned about her marriage, do I understand you to say, between September, her birthday, and the time that this homestead was filed. Is that correct? A. Yes.

Q. Was that at my office that we discussed this matter? A. Yes.

Q. Did I tell you at that time, Mr. Blagg, or did I say anything to you at that time with respect to what effect, what legal effect her marriage would have upon your right to file a homestead as the head of a household?

Mr. McDonnell: Just a moment. Your Honor, I don't think that is a proper method of interrogating counsel's own witness. [14]

The Referee: Your objection is sustained.

Q. (By Mr. Gordon): At that time, Mr. Blagg, on December 19th or thereabouts of 1956, you told

(Testimony of Lewis F. Blagg.)

us that Roberta's home was with you, but she was physically present in Turlock? A. Yes.

Q. Were all of her personal effects in Turlock or were there any in the Temple City address with you?

A. Well, there was quite a bit at the house, but now she is outgrowing them, of course.

Q. For how long has she gone to school in Turlock?

A. That would make two semesters then.

Q. What semesters would they be? Give us the dates?

A. In other words, it would be starting from September into 1956—when does it start and end, in June?

Q. The school year?

The Referee: Ending in June of what year, 1957, is that what you are alluding to?

The Witness: No.

The Referee: You stated she started in September of 1956, going to school in Turlock.

The Witness: Well, she started going to school at the start of the term—when do they start, February, something like that? [15]

Mr. Gordon: No, September.

The Witness: They start in February and go to June and get time off and then go back to school.

Q. (By Mr. Gordon): Between February and June of 1956, where was Roberta? Where was she physically present from February to June of 1956?

A. She was up with her grandmother.

(Testimony of Lewis F. Blagg.)

Q. Was she at her grandmother's before February of 1956, or was that her first semester away from home?

A. That was the first full semester.

Q. So, from February to June of 1956, she was in Turlock? A. Yes.

Q. Prior to February of 1956, where was she making her home?

A. Well, part of the time down here, and then whenever it was we sent her up there—I forget the exact date.

Q. Did she return to your home in June of 1956? A. Yes.

Q. And she remained until when?

A. Labor Day.

Q. Labor Day of 1956? A. Yes.

Q. Then where did she go?

A. Back to Turlock. [16]

Q. So that is the beginning of the fall semester in 1956? A. Yes.

Q. When did she return, if at all, after that?

A. She hasn't been down since.

Q. She is still going to school in Turlock?

A. Yes.

Q. During the time she was in Turlock, specifically from February, 1956, to June, did you support Roberta; pay for her clothes or food and the necessities of a child?

A. Yes; whatever her grandmother thought was sufficient.

Q. In other words, the grandmother would write

(Testimony of Lewis F. Blagg.)

you and ask you for money and you would send some up. Is that correct? A. Yes.

Q. During the school vacation period from June to September of 1956, did you support Roberta then? A. Yes.

The Referee: From June to September where was she living physically?

The Witness: Physically she was living here.

Q. (By Mr. Gordon): At the Temple City address? At your home, in other words?

A. Yes.

Q. Did she come down during any of the interim [17] school vacations: the Easter vacation or the Christmas vacation? I am speaking of the spring of 1956. I am taking from the period of February, 1956, to June, 1956. Did she come down during any vacation in that period?

A. I don't believe so. If she did, it was only for a week end or something.

Q. What about Easter?

Mr. McDonnell: I think counsel got an answer to that question, and I will object to him leading the witness by suggesting answers.

The Referee: The objection is sustained.

Q. (By Mr. Gordon): Did Roberta come down at all after September of last year to the present time? A. No, sir.

Q. After she went back after Labor Day of 1956, did you continue to support Roberta?

A. Yes, sir.

(Testimony of Lewis F. Blagg.)

Q. Were any of her clothes and personal effects still with you after September of 1956?

A. Yes, sir.

Q. Were they with you on December, 1956, at the time of the filing of the homestead?

A. Yes.

Q. Did you at any time enter into any agreement, oral or otherwise, with Mrs. Blagg in which you consented to take custody and control of Roberta, that she may be [18] given to Mrs. Blagg?

A. No, sir.

The Referee: Has any agreement of any kind been entered into between you and Mrs. Blagg relating to the custody of the children?

The Witness: No, sir. I have never seen or spoke to her since she left that day.

Q. (By Mr. Gordon): Mr. Blagg, when did you first learn of the contents of the decree of divorce, a copy of which has been introduced here as Bankrupt's Exhibit 1?

A. I can't tell you the exact date, but you said it would be required for the Referee or something, and I had to go up and get the certified copy from Glen Lane.

Q. Who was your local counsel at that time?

A. Yes.

Q. Was it within the last month or two or prior to the filing of the bankruptcy petition?

A. It was within the last month.

Q. Did you prior to that time know that the Nevada Court had awarded control and custody

(Testimony of Lewis F. Blagg.)

of Roberta—I believe it is limited to Roberta, if I am not mistaken?

The Referee: Yes, that is all contained in paragraph II of Bankrupt's Exhibit 1.

Q. (By Mr. Gordon): I will repeat the question. Did you prior to the time you saw this copy of the divorce decree know that the Nevada Court had granted custody and [19] control of Roberta to Mrs. Blagg?

A. No, sir, I didn't know it.

Q. Did you know that Court had also awarded or had also ordered that you pay to Mrs. Blagg the sum of \$20 per week for the support of Roberta?

A. No, sir.

Q. Have you ever paid Mrs. Blagg anything for the support of Roberta?

A. No, sir.

Q. Has Mrs. Blagg ever had any custody or control of Roberta since she left you in 1954 in December?

A. No, but in the last three months or something, yes, sir.

Q. What happened in the last three months?

A. They are living in Kerman, and she gets up there on weekends.

Q. Who is living in Kerman?

A. Isabelle; Mrs. Blagg.

Q. You mean Roberta goes down to see her from her grandmother's house?

A. Yes.

Q. Do you know whether Mrs. Blagg has had custody of Roberta?

Mr. McDonnell: That is really calling for a legal conclusion.

(Testimony of Lewis F. Blagg.)

Mr. Gordon: I will withdraw the question. [20]

Q. At any rate, you know that Roberta is not living with Mrs. Blagg? A. Yes.

The Referee: How far is Kerman from Turlock?

The Witness: About 125 miles is my guess.

Q. (By Mr. Gordon): Mr. Blagg, from December, 1954, at the time Mrs. Blagg left until the present time you have had and have taken the responsibility of supporting Roberta. Is that correct?

Mr. McDonnell: Object to the question as calling for a conclusion of the witness. The witness can tell us what he did; other than that it is a conclusion.

The Referee: I think the proper way is to show what he has done towards her support, rather than ask him if he has undertaken the responsibility of supporting her.

The objection is sustained.

There has been considerable leading of the witness, some of which is probably harmless, but some of the conclusions are the direct problems confronting the Court for determination, which are really legal conclusions.

Mr. Gordon: I don't want to belabor the point. I am going on this basis, the matter of intent is an important question here in connection with his being head of the family.

The Referee: But the Court determines the intent of the party from the acts and facts and conduct; not whether [21] after bankruptcy is filed the

(Testimony of Lewis F. Blagg.)

witness says, it is my intention or not my intention.

Q. (By Mr. Gordon): In resume let me put it this way, Mr. Blagg: from the time Mrs. Blagg left in December of 1954, through June of 1956, with the exception of the period from February, 1956, to June, 1956, both your eldest daughter Frances and your daughter Ann lived with you?

A. Yes, sir.

Q. And Roberta, with the exception of that period from February to June, 1956?

A. Yes.

Q. And you provided the support for all three of them, did you not, during that period of time?

A. Yes, sir.

Q. Including the time that Roberta was in Turlock between February and June of 1956?

A. Yes.

Q. And Roberta would go to Turlock or come back upon your say-so, isn't that correct? You made the determination as to whether Roberta was to go or not to go? A. Yes.

Q. And it was you who determined that Roberta should go to her grandmother's and attend school there. Is that correct, sir? A. Yes.

Q. From June, 1956, until some time into the Christmas [22] season of 1956, you supported Ann also, did you not? A. Yes, sir.

Q. Even though she was already married?

A. Yes, sir.

Q. And you also supported Roberta from June

(Testimony of Lewis F. Blagg.)

of 1956, through the entire year of 1956. Is that correct?

A. Yes, sir.

Q. And also for this much of 1957 that has already elapsed?

A. Yes.

Q. Roberta did not visit her mother on these weekends at Kerman prior to these last three months. Is that correct?

Mr. McDonnell: I will have to object to the question on the ground it is leading and suggestive, and further, it has been asked and answered.

The Referee: The objection is sustained on the ground it has been asked and answered, and on the further ground it is leading and suggestive. This is direct examination and the witness is your witness, Mr. Gordon.

In other words, the witness testified, if my notes are correct, that since Mrs. Blagg has been living in Kerman, Roberta visits her on weekends; she comes down from Turlock, and I asked the witness what the distance was, and he said approximately 125 miles, and that has been occurring during the past three months. [23]

* * *

Cross-Examination

By Mr. McDonnell:

Q. Mr. Blagg, I want to go back over just one or two items that were covered by your attorney.

Let's first go to the divorce that you and Mrs. Blagg had. Did you know that Mrs. Blagg was going to obtain that divorce before she did?

A. No, not before she did, actually. You see,

(Testimony of Lewis F. Blagg.)

we had no track of her. Actually, we didn't know where she was.

Q. You had an attorney, Mr. Lane. Did he represent you locally in connection with that matter?

A. By locally you mean in Los Angeles?

Q. Yes, in Los Angeles locally? [42]

A. Yes.

Q. Did he represent you before or after the divorce was obtained in 1955 in connection with it?

A. Well, it was just about that time, I would say. In other words, the reason I obtained the attorney was we had some notification or record of her starting to get a divorce.

Q. Didn't you enter into some sort of a property arrangement with her where you agreed to pay her something?

A. Not until after the divorce proceedings.

Q. That was after the divorce proceeding?

A. Yes.

Q. Were you ever served with any paper at any time? A. Not that I can remember.

Q. It wasn't until after the divorce proceeding, then, that you conferred with Mr. Lane?

A. No; it was just before.

Q. Just before?

A. In other words, the divorce was not final yet, and I conferred with Mr. Lane when I found out that she had started proceedings.

Q. In other words, when you knew she had filed a complaint? A. Yes.

Q. How did you find that out?

(Testimony of Lewis F. Blagg.)

A. I believe that a lawyer in Temple City [43] called me and told me that she was starting proceedings.

Q. Did he represent her?

A. He did not, no, sir, because she evidently got someone to represent her or she decided not to have him, I don't know which.

Q. As I understand your testimony, you never saw the divorce decree until fairly recently? That is the document which is Objector's Exhibit No. 1 in evidence, you never saw that?

A. No, sir. I would venture to say it must have been about not over three days before this other proceeding here.

Q. Have you at any time since 1955 instituted a divorce proceeding of this kind against your wife in these courts or in any other place?

A. No, sir.

Q. Let's talk for a moment about your daughter, Roberta. She is the younger daughter. Let me see if I can find out when it was she went north to Turlock. Do you recall that date?

A. It would be around Christmas, something like that, 1956, shortly afterwards.

The Referee: That is when she first went to Turlock?

The Witness: Yes.

Q. (By Mr. McDonnell): She didn't go there until Christmas of last year? [44]

A. She was there last year all year long outside of these three months that she was with me, and she

(Testimony of Lewis F. Blagg.)

was there the semester previous to that. That would be 1955, wouldn't it?

Q. On March 29, 1957, you were here and we examined you and went over some of this terrain before, didn't we? A. Yes.

Q. My notes reflect, which were made that afternoon, that at that time I understood you to say that your daughter had gone to Turlock some time in the late Spring of 1955. Is that right?

A. Somewhere close to that, yes.

Q. In other words, I notice that the divorce decree is dated May 12, 1955. Was it shortly after that? A. Yes.

Q. And she went there and stayed a semester, as it were? A. Yes.

Q. Had she up until that time been attending school in Temple City? A. Yes.

Q. How long had your wife been gone at that time? A. That is May, 1955, is it not?

Q. Yes.

A. And she had been gone since before Christmas of 1954. [45]

Q. Your daughter went north to Turlock then some time in the spring of 1955. Is that correct?

A. Yes.

Q. Did she return during the school vacation of 1955, some time between June and September?

A. Yes, sir.

Q. Did she reside with you? Did she have her place where she slept and where she kept her clothes and her effects at your home?

(Testimony of Lewis F. Blagg.)

A. Yes, sir.

Q. Did she sleep somewhere else during that time for several months during that summer vacation?

A. No; maybe a couple of days.

Q. When you were here before I thought I understood you to indicate, perhaps I was wrong, but will you tell me, I will ask you isn't it a fact when she came down in the summer vacation of 1955 she stayed with you only a day or two, then she went and lived with an aunt in nearby Temple City for the duration of the summer vacation? Isn't that correct?

A. She was with me over a day or two, because she spent about two weeks with her aunt.

Q. She was with you, in other words, all but two weeks?

A. Yes.

Q. That was 1955. [46]

Let me ask you the name of the lady in Turlock with whom she spent this time. That is Clara Sims, isn't it?

A. Right.

Q. What is Clara Sims' relation to Roberta?

A. Grandmother.

Q. Is she her maternal grandmother or paternal grandmother?

A. Maternal.

Q. In other words, Clara Sims is your wife, Isabelle's mother?

A. Right.

Q. And you made the arrangements with Clara Sims for your daughter, Roberta, to go live with her shortly after the divorce in 1955. Isn't that correct?

A. Yes, sir.

(Testimony of Lewis F. Blagg.)

Q. Have you been up to visit at Turlock since that time? A. No; I haven't.

Q. You testified before on your interrogation that you understand that your daughter, Roberta now sees her mother over week ends; her mother living in Kerman. Are you certain of the distance between Kerman and Turlock?

A. No; I am not.

Q. It could be something less than your estimated 125 miles? [47] A. Yes.

Q. Perhaps as little as 25 or 50?

A. I don't think so.

Q. Both of them are in the San Joaquin Valley?

A. Yes.

Q. And Kerman is west of Fresno and Turlock is northwest of Fresno?

A. Yes. Turlock is only about 10 miles from Modesto.

Q. Do you have some reason for saying that she did not see her mother in Kerman except during the last two or three months?

A. Yes, because the kids were more in touch with her than I was. Most of my information is secondhand. In other words, sir, frankly, I think she was away from there until the last two or three months, because Isabelle was living with a man who wasn't married——

Q. In other words, you don't know for certain that Isabelle didn't see Roberta after the period after May or June of 1955 until the last two or three months, do you?

(Testimony of Lewis F. Blagg.)

A. She must have seen her a few times.

Q. She did see her from time to time?

A. She must have gone up to Turlock to visit her own mother once or twice.

Q. Let's talk about the support. You told your attorney that you supported Roberta. How did you support [48] her? Let's begin as soon as she went north to Turlock. Did you take her up north to Turlock or did she go by herself or did someone come and get her?

A. I sent her up by train.

Q. You didn't go with her? A. No.

Q. Did you send a sum of money with her then?

A. Yes.

Q. How much? A. I wouldn't remember.

Q. Did you make an arrangement with Clara Sims to send a definite sum of money each month?

A. No; I didn't.

Q. Did you send a definite sum of money each month? A. No, sir.

Q. Did you send money at all? A. Yes, sir.

Q. How did you determine how much to send?

A. Well, it is on a ranch, and Clara just figured it out, how much her board and room was, I guess; then when she wanted extra money for clothes she would tell me.

Q. Did you pay her board and room?

A. Well, I mean, I paid for her school, her clothes and a small amount for her board and room. It wasn't anything like that \$20 a week in there or anything.

(Testimony of Lewis F. Blagg.)

Q. How much did you average paying on the support [49] for board and room?

A. I don't really know.

Q. Did you send a regular sum at all?

A. At the time we were talking about Clara said \$35 to \$40 a month was plenty, because that is as much money as they could get in an institution, you know, a County institution or something.

Q. Did you send that sum?

A. Approximately. As I say, there was more at times, because when she needed clothes, why, they would ask for more money.

Q. You would send the money up and the clothes would be purchased then. Is that correct?

A. Yes.

Q. When the clothes were purchased in Turlock, were they kept in Turlock?

A. They were kept in Turlock except when she came down here.

Q. When she came down here would she bring her luggage, and in it clothes you had purchased?

A. Yes.

Q. She has some clothes, you testified, down here?

A. Yes.

Q. Those are old clothes that she has outgrown, aren't they, for the most part?

A. They are outgrown this year, yes. [50]

Q. When she goes back to Turlock she takes with her all the clothes that she has that fits her. Isn't that correct?

A. Yes.

(Testimony of Lewis F. Blagg.)

Q. Does she keep some of her personal effects at all times up in Turlock, to your knowledge?

A. Well, yes. She has a couple of suitcases and a trunk that I bought her.

Q. And she keeps those things up there?

A. Yes.

Q. I want to show your counsel the original declaration of homestead.

Mr. Gordon: I have seen it.

Q. (By Mr. McDonnell): I want to show you a two-page typewritten document entitled, "Declaration of Homestead." Have you seen that document before, Mr. Blagg? Just answer my question yes or no, please.

A. Well, yes.

Q. Is that your signature at the bottom of the document?

A. Yes, sir.

Mr. McDonnell: I will offer this as Trustee's first in order, your Honor. I believe that would be "A".

The Referee: The Declaration of Homestead dated December 18, 1956, is being received in evidence as Trustee's Exhibit "A". [51]

TRUSTEE'S EXHIBIT A

Declaration of Homestead

Be It Known that I, Lewis F. Blagg, a single man; hereby declare that I am at the time of the making of this Declaration actually residing on the premises

(Testimony of Lewis F. Blagg.)

hereinafter described and claim them as a home-stead.

The premises so claimed by me consist of the real property situated in Temple City, County of Los Angeles, State of California, and described as follows:

All of Lot 61 and the south westerly 10 ft. of Lot 62, Tract 11584, as recorded in Book 213/2 and 3 of Maps, in the office of the County Recorder of Los Angeles County, California, said property formerly being registered land entered on a memorial certificate M. H. 2129.

Said property consists of a 10-room residence and converted garage located at 11042 West Hondo Parkway, Temple City, California.

That I estimate the actual cash value of said premises exclusive of the business portion thereof which is located over the Bank at the rear, to be the sum of \$30,000.00.

In Witness Whereof, I hereunto set my hand this 18th day of December, 1956.

/s/ LOUIS F. BLAGG.

State of California

County of Los Angeles—ss.

Lewis F. Blagg, being first duly sworn, deposes and says:

(Testimony of Lewis F. Blagg.)

That he has read the above and foregoing Declaration of Homestead and that all of the facts therein stated are true.

/s/ LOUIS F. BLAGG.

Subscribed to and sworn to before me this 18th day of December, 1956.

[Seal] /s/ MAURICE GORDON,
Notary Public in and for Said
County and State.

State of California

County of Los Angeles—ss.

On the 18th day of December, 1956, before me, a notary public in and for said county and state, personally appeared Lewis F. Blagg, known to me to be the person whose name was subscribed to the within instrument, and he acknowledged to me that he executed the same.

In Witness Whereof, I hereunto set my hand and seal the day and year first above written.

[Seal] /s/ MAURICE GORDON,
Notary Public in and for Said
State and County.

[Endorsed]: Filed May 8, 1957, Referee.

(Testimony of Lewis F. Blagg.)

Q. (By Mr. McDonnell): I now lay before you a single page typewritten document with the legend, "Declaration of Abandonment of Homestead." Have you seen this document before? Just answer yes or no, please. A. Yes.

Q. And is your signature on it? A. Yes.

Mr. McDonnell: I will offer that as Trustee's next in order, your Honor.

The Referee: It will be received as Trustee's "B".

TRUSTEE'S EXHIBIT B

Declaration of Abandonment of Homestead

Know All Men By These Presents: That I, Lewis F. Blagg, do hereby declare that I am a single man and I do hereby abandon the homestead heretofore declared on the property and premises hereinafter described, the declaration whereof was recorded on the 18th day of December, 1956, under Document number 2862, in the office of the County Recorder of Los Angeles County, State of California.

Said premises herein referred to, and the homestead upon which is hereby abandoned, are situated in the County of Los Angeles, State of California, and described as follows, to wit:

All of Lot 61 and the southwesterly 10 feet of Lot 62, Tract 11584, as recorded in Book 213, Pages 2 and 3 of Maps, in the office of the

(Testimony of Lewis F. Blagg.)

County Recorder of said county and state, said property formerly being registered land entered on a memorial certificate M. H. 2129.

In Witness Whereof, I have hereunto set my hand this 19th day of December, 1956.

/s/ LEWIS F. BLAGG.

State of California

County of Los Angeles—ss:

On the 19th day of December, 1956, before me, a notary public in and for said county and state, personally appeared Lewis F. Blagg, known to me to be the person whose name was subscribed to the within instrument, and he acknowledged to me that he executed the same.

[Seal] /s/ MAURICE GORDON,
Notary Public in and for Said
County and State.

[Endorsed]: Filed May 8, 1957, Trustee.

Mr. McDonnell: May I see Exhibit 2, I believe it is, and Exhibit "A", please?

The Referee: Yes.

Q. (By Mr. McDonnell): I now lay before you the exhibit which has been marked Trustee's Exhibit "A", which is a Declaration of Homestead dated December 18, 1956. Do you see that, Mr. Blagg?

(Testimony of Lewis F. Blagg.)

A. Yes.

Q. I also lay before you a document which is Bankrupt's Exhibit 2 in evidence, which is a Declaration of Homestead dated the 19th day of December, 1956.

I call to your attention that Bankrupt's 2 says in part: "I, Lewis F. Blagg, do hereby declare that I am the head of a family, but that I am not married, and that my family consists of myself and a minor daughter." [52]

Do you see that? A. Yes.

Q. The second document, which is Trustee's Exhibit "A", says in part:

"I, Lewis F. Blagg, a single man hereby declare that I am, at the time of the making of this declaration, actually residing on the premises hereinafter described and claim them as a homestead."

The first document was on the 18th of December, when it was signed, and the next document was on the 19th. Was there any change in your residence status, that is, in the way in which you were living, between the 18th of December and the 19th of December?

Just answer yes or no.

A. No. This was a misunderstanding here.

Q. Mr. Blagg, do you have a mother? Is she living? A. No, sir.

Q. Do you have any relatives, such as a brother or a sister? A. Yes, sir.

Q. Do they live in California?

(Testimony of Lewis F. Blagg.)

A. Yes; three of them.

Q. Is it an aunt which your daughter Roberta visited during the summer vacation of 1955; is she a blood-relative of yours or a relation of your former wife's? [53]

A. She is a sister of my wife's brother, not a relative, that is, a blood relative of either of us.

Q. She is actually a relative by marriage?

A. Yes, sir. [54]

* * *

Redirect Examination

By Mr. Gordon:

Q. Mr. Blagg, will you describe or tell us, rather, the circumstances surrounding the execution of these two different homesteads: Exhibit "A," the original homestead dated December 18, 1956, in which you are described as a single man, and the one the day following, December 19, 1956, which I believe is Exhibit "B", or rather, [60] Objector's Exhibit 1. Can you tell us what occurred, if you know, that caused the change to be made the following day like that?

A. Well, Mr. Jones just didn't know I had children at the house or anything, and he set it up, and as soon as he found out about it the next day he said, "We will have to change it immediately." That was no—through no fault of his, because it was a rush, and he said, "Are you married?"

(Testimony of Lewis F. Blagg.)

I said, "No." And that is the way it went in, that I am not a married man.

Mr. Gordon: That is all.

Recross-Examination

By Mr. McDonnell:

Q. On December 18, 1956, Mr. Blagg, did you know that your daughter Ann was married?

A. That is hard for me to remember, but I think I did. That is, I didn't know it straight out, but I think I had an idea.

Q. Did you on the 19th, the next day?

A. I guess—that was the day we filed it.

Q. It is the day of the second homestead.

A. I knew it the next day. That is when I called and I told Mr. Gordon she was 17 years old, and I called up and found out she was 18. [61]

Q. That is why you did not include her as one of the family of which you were the head. Is that right?

A. That is correct.

Mr. McDonnell: Nothing further.

Redirect Examination

By Mr. Gordon:

Q. Upon whose advice did you not include her, Mr. Blagg?

A. I believe it was yours, Mr. Gordon.

Q. Did I give you my reason for my belief that she was not to be included?

(Testimony of Lewis F. Blagg.)

A. I think at the time you said, well, as soon as we found out she was 18, I believe you said she is now an adult, if she is married.

Mr. Gordon: That's all.

Mr. McDonnell: Nothing further.

The Referee: You may step down, Mr. Blagg.

Anything further gentlemen?

Mr. Gordon: Nothing further by way of evidence. [62]

* * *

[Endorsed]: Filed August 21, 1957. Referee.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 77, inclusive, containing the original:

Debtor's Petition, filed 12/21/56

Orders of Adjudication and of General Reference
Trustee's Report of Exempt Property

Objections to Report of Trustee

Referee's Memorandum Opinion re Objections to
Trustee's Report of Exempt Property

Findings of Fact, Conclusions of Law re Objections to Trustee's Report of Exempt Property

Order on objections to Trustee's Report of Exempt Property

Petition for Review

Notice of filing Certificate on Review

Certificate on Review

Order Sustaining Referee on Review

Notice of entry of "Order Sustaining Referee on Review"

Notice of Appeal

Designation of Contents of Record on Appeal and Points to Be Relied Upon on Appeal

Designation of Additional Contents of Record on Appeal.

B. Bankrupt's Exhibits 1 and 2

Trustee's Exhibits A and B

C. One volume of Reporter's Transcript of Proceedings had on: 5/8/57

I further certify that my fee for preparing the foregoing record, amounting to \$1.60 has been paid by appellant.

Dated: February 26, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ WM. A. WHITE,
Deputy Clerk.

(Seal)

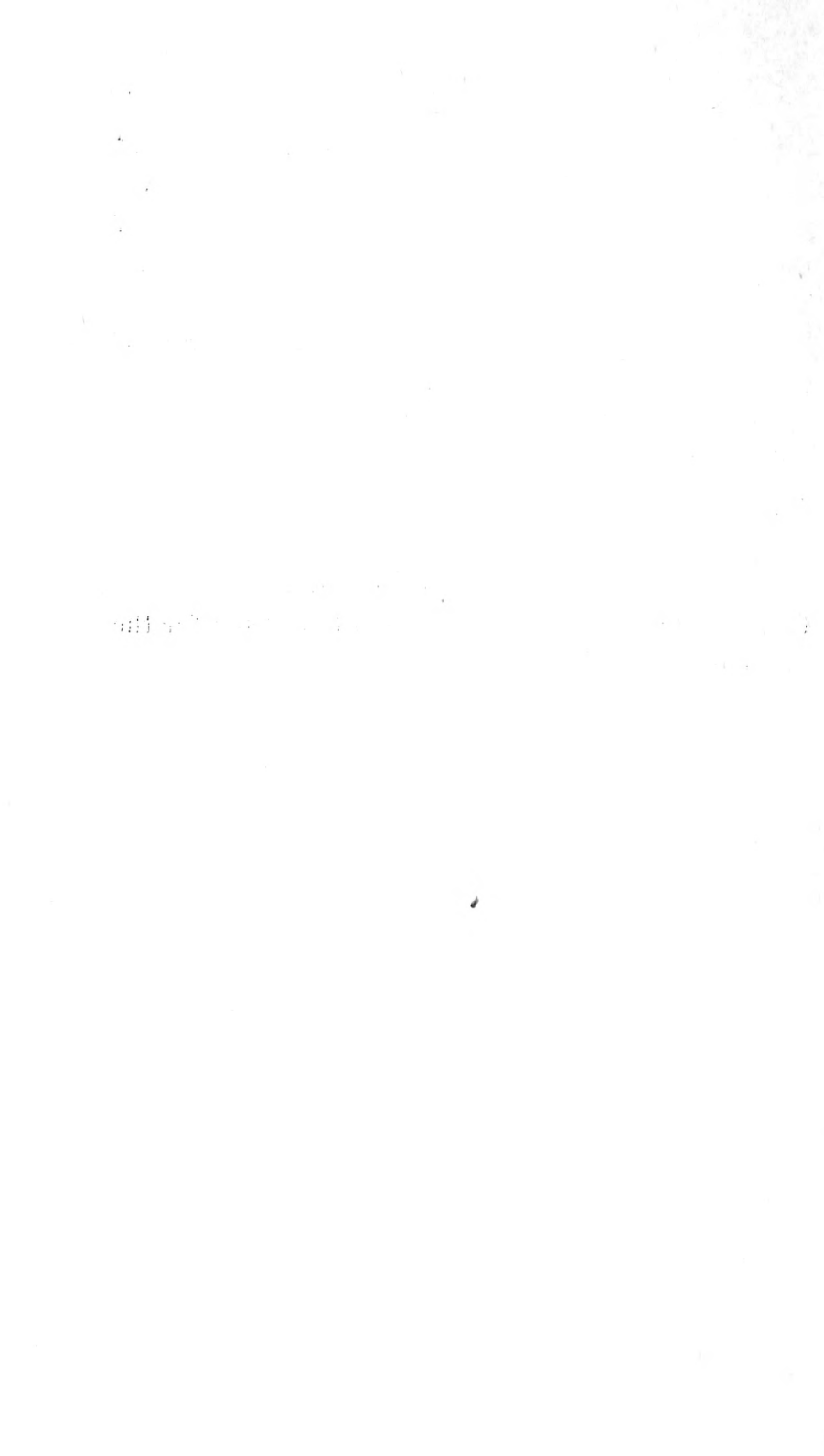
[Endorsed]: No. 15933. United States Court of Appeals for the Ninth Circuit. Lewis F. Blagg, Appellant vs. Irving I. Bass, Trustee in Bankruptcy of the Estate of Lewis F. Blagg, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 27, 1958.

Docketed: March 17, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.



No. 15933

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEWIS F. BLAGG,

Appellant,

vs.

IRVING I. BASS, Trustee in Bankruptcy of the Estate of
Lewis F. Blagg, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

MARK F. JONES, JR., and
MAURICE GORDON,

1025 C. C. Chapman Building,
756 South Broadway,
Los Angeles 14, California,

Attorneys for Appellant.

FILED

JUL 18 1958

PAUL P. O'BRIEN, CLERK

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No. 15933

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEWIS F. BLAGG,

Appellant,

vs.

IRVING I. BASS, Trustee in Bankruptcy of the Estate of
Lewis F. Blagg, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from an Order of the District Court for the Southern District of California, Central Division, following a petition to that Court to Review an Order of the Referee in Bankruptcy, affirming the Trustee's Report on Exempt Property and denying appellant's Petition for Review of said Referee's Order.

The Order of the said District Court also adopted the Findings of Fact and Conclusions of Law on which said order of the referee was founded.

The jurisdiction of the District Court is based on Section 2(a)(10) of the Bankruptcy Act (11 U. S. C. Sec. 11).

Jurisdiction of this Court is based on Section 24 of the Bankruptcy Act (11 U. S. C. Sec. 47).

Questions Presented.

The questions presented are:

1. Whether the District Court erred in sustaining and confirming the Order of the Referee; which held that the homestead recorded by appellant was null and void and of no force or effect, and that appellant had no right, title or interest in the premises covered by the homestead;
2. Whether the finding that appellant's minor daughter was not residing with appellant on the premises covered by the homestead is supported by and is not contrary to the evidence;
3. Whether the Conclusion of Law by the referee that appellant on December 19, 1956 was not the head of a family, is not contrary to law;
4. Whether the referee erred in refusing to allow appellant a homestead exemption as a single man, in the amount of \$5,000.00.

Specifications of Error.

The errors relied on are:

1. That it was error to sustain and confirm the Order of the Referee holding the declaration of homestead filed by appellant to be null and void and of no force or effect;
2. That it was error to rule that appellant had no right, title or interest in the homestead covered by said declaration of homestead;
3. That it was error to find that appellant's minor daughter was not residing with appellant on the premises and that she was not under his care and maintenance;
4. That it was error to rule that appellant was not the head of a family on the date of the filing of the declaration of homestead;

5. That it was error to refuse to allow appellant a homestead exemption to the extent of \$5,000.00, as a single man.

Statement of Facts.

On December 19, 1956 appellant filed a Petition in Bankruptcy. Listed among his assets was the equity in his home. [Tr. pp. 3-5.]

In Schedule 5-B of his petition, appellant claimed a homestead as the head of a family. The claim was set forth in the following language:

“Homestead on home at 11042 West Hondo Parkway, Temple City; Petitioner’s 11 year-old daughter resides with petitioner during the summer months school vacations and petitioner therefore believes he is entitled to the exemption provided by Sections 1260-1261 of the California Civil Code, to wit: \$12,500.00.”

On April 10, 1957, appellee, the trustee in bankruptcy, filed his Report of Exempt Property, in which he refused to set aside the home of appellant as a homestead. [Tr. p. 7.]¹

On April 22, 1957 appellant filed his objections to the Report of Trustee. [Tr. pp. 8-9.]

A hearing was held before the referee on the trustee’s report and appellant’s objections thereto.

Following the conclusion of the testimony the referee filed his Memorandum Opinion in *re* Objections to

¹Appellant also claimed as exempt various tools used in his business as well as office furniture. The trustee refused to exempt the said tools and office furniture. However, appellant has waived any contention concerning the tools or the office furniture.

Trustee's Report of Exempt Property [Tr. pp. 10-16]; Findings of Fact, Conclusions of Law in *re* Objections to Trustee's Report on Exempt Property [Tr. pp. 16-20]; and his Order on Objections to Trustee's Report on Exempt Property [Tr. pp. 20-21].

The basis for the order refusing to exempt appellant's residence as a homestead is found in Finding No. VII, which reads as follows:

"From at least September, 1956, to and including May 8, 1957, the date of the hearing herein, Roberta Blagg, the minor daughter of the bankrupt herein, has not resided with her father, Lewis F. Blagg, upon the premises claimed as homeland as the head of a family located at 11042 West Hondo Parkway, Temple City, California, but, on the contrary, the care, custody and control of said minor child has by judicial decree been awarded to her mother and she has during all of such period resided with her maternal grandmother and the bankrupt has not supported or maintained said minor child during said period." [Tr. p. 19.]

As Conclusions of Law, the Referee held:

"On December 19, 1956, the bankrupt was not head of a family and the homestead on the property located at 11042 West Hondo Parkway, Temple City, California, is null, void and of no force or effect."

(Conclusion III);

"The homestead filed by the bankrupt on December 19, 1956, was null and void and of no effect as to this bankrupt estate or the trustee in bankruptcy thereof." [Tr. p. 20; Conclusion IV.]

The Order made by the referee, with respect to the homestead matter, reads as follows:

“3. That certain homestead filed herein by the bankrupt on December 19, 1956 . . . is null, void and of no force or effect and the bankrupt has no right, title or interest therein or claim thereon by reason of the said destination (*sic*) of homestead or otherwise or at all and said real property and all of the infringements (*sic*) thereon constitutes an asset of the bankrupt estate herein.” [Tr. pp. 21-22.]

On August 16, 1957 appellant filed his Petition for Review by the District Court of the Order of the Referee. [Tr. pp. 22-24.]

On September 6, 1957 the referee filed his Certificate of Review. [Tr. pp. 25-31.]

On January 14, 1958 the Honorable Harry C. Westover, Judge of the District Court made his Order Sustaining the Referee on Review. [Tr. pp. 31-32.]

Résumé of Evidence.

Appellant was the only witness who testified at the hearing.

He testified that he has lived on the premises in question for approximately 17 years; that he is not presently married and was divorced by his wife at Reno, Nevada in 1955 and that the divorce was obtained by Mrs. Blagg. [Tr. p. 37.]

Appellant was not physically present in the State of Nevada at the time the divorce matter came on for hearing. None of his children were physically present in that State at the time the divorce decree was rendered, particularly Roberta. As far as he knew Roberta had never

been in the State of Nevada in the year 1955. Roberta is 12 years of age. Appellant was not represented by counsel in the Nevada divorce proceedings. He has two other children besides Roberta; they are, Ann Blagg, now Ann Bowman, 18 years of age who has been married since September, 1956. The other child is Frances Louise Vincent, 23 years of age, who has been married since June 1955. [Tr. pp. 40-41.]

In 1956 and on December 19, 1956 Roberta's home was at the West Hondo Parkway property (the home of appellant). [Tr. p. 45.] She was not physically present on the premises on December 19, 1956. She was physically present on the premises between June and September 1956. After September her physical presence was at her grandmother's in Turlock, California. She was going to school there.

Appellant sent Roberta to Turlock for the reason that the school there was similar to the one here and he thought that she would get along better and get away for a while from the situation here (referring to the divorce proceedings). [Tr. p. 46.]

Mrs. Blagg was not, in December 1956, residing on the premises and had not been since approximately the Christmas of 1954. He and Mrs. Blagg separated at that time. He does not know where Mrs. Blagg was from December 1954 on.

He was not in direct communication with Mrs. Blagg and as a matter of fact Mrs. Blagg had just left the premises and had left home and the three children there. [Tr. p. 47.]

Some of Roberta's personal effects were at his home on December 19, 1956. Between February and June of

1956 Roberta was with her grandmother at Turlock, California. This was the first full school semester. She returned to appellant's home in June of 1956 where she remained until Labor Day when she returned to Turlock at the beginning of the Fall school-semester. She has not been down since and is still going to school in Turlock. Between February and June of 1956 he supported Roberta and sent whatever money her grandmother thought was sufficient. [Tr. pp. 50-51.]

During the school vacation period from June to September, 1956 she was physically living at appellant's home and he supported Roberta. He does not believe that she came down during any of the school vacations between February and June of 1956, but if she did it was only for a week end. After September 1956 to the date of the hearing Roberta did not come down from Turlock. He continued to support her and some of her clothes and personal effects were still in the house after September 1956 and were at the house in December 1956 at the time of the filing of the Declaration of Homestead.

At no time did he ever enter into any agreement, oral or otherwise, in which he consented that the custody and control of Roberta would be given to Mrs. Blagg; nor did he have any agreement of any kind with Mrs. Blagg relating to the custody of the children; that he has never seen or spoken to Mrs. Blagg since she left. [Tr. pp. 52-53.]

He learned of the contents of the Divorce Decree [App. Ex. "1"] within the month preceding this hearing. He did not know prior to the time that he was served with a copy of the Divorce Decree, that the Nevada Court had granted custody and control of Roberta to Mrs. Blagg or that the Court had also awarded Mrs. Blagg the sum

of \$20.00 per week for Roberta's support. He has never paid Mrs. Blagg anything for Roberta's support. Mrs. Blagg has never had custody or control of Roberta since the former left in 1954. In the last three months Roberta has gone to see her mother on week ends, at Kerman where the mother lives. He knows that Roberta is not living with Mrs. Blagg. [Tr. pp. 53-55.]

From the time Mrs. Blagg left in December 1954, through June 1956, his two older daughters, Frances and Ann, lived with him, as well as Roberta, except that Roberta was away to school between February and June 1956. He provided the support for all three children during that time, including the time Roberta was in Turlock between February and June 1956. Roberta would go to Turlock or come back upon his say-so. He made the determination as to whether Roberta was to go or not to go. It was he who determined that Roberta should go to her grandmother's and attend school there.

From June 1956 until some time into the Christmas Season of 1956 he supported his daughter Ann though she was already married. He also supported Roberta from June 1956 through the entire year of 1956 and also during all of 1957 to the date of the hearing. [Tr. pp. 56-57.]

On cross-examination appellant testified that he did not know in advance that Mrs. Blagg was going to get a divorce, that he had no track of her and did not know where she was. He did not enter into a property arrangement with Mrs. Blagg until after the divorce proceeding. He conferred with Mr. Lane (an attorney) when he found out that she had filed a complaint. He believes he found out about the filing of the divorce action through a lawyer in Temple City who called him and told him that

she had started proceedings. He testified that he had not seen the divorce decree himself until three days before "this other proceeding here" referring to a 21-A examination by the Trustee. [Tr. pp. 57-59.]

Roberta went to Turlock in the Spring of 1955 shortly after the date of the Divorce Decree on May 12, 1955. Up to that time she had attended school in Temple City (the place of his residence). She returned during the school vacation of 1955, some time between June and September at which time she resided with appellant. She had her place where she slept and where she kept her clothes and effects at his home. She did not sleep anywhere else during that time for several months during the summer vacation, except for a couple of days. She was with him for all of 12 weeks during the school vacation period in 1955. [Tr. pp. 60-61.]

Clara Sims is Roberta's maternal grandmother. He made arrangements with Clara Sims for Roberta to live with her, shortly after the divorce in 1955. He has not been up to visit at Turlock since that time. [Tr. p. 61.]

He sent Roberta to Turlock by train but did not go with her; he sent a sum of money with her at that time but he does not remember how much. He did not make any arrangements with the grandmother to send a definite sum each month. He does not send a definite sum each month. He does send money. The amount is determined by the grandmother figuring out how much would cover her room and board and when the grandmother wanted extra money for clothes she would tell him. He paid for Roberta's school, her clothes, and a small amount for room and board. [Tr. p. 63.]

He cannot state an average of the amount he paid for room and board; the grandmother said that \$35.00 to \$40.00 a month was plenty and he sent approximately that sum. At times there was more as when she needed clothes. He would send the money up and the clothes would be purchased. The clothes were kept in Turlock except when Roberta came home, at which time she would bring her luggage and the clothes she had purchased. When she goes back to Turlock she takes the clothes that fit her. She keeps some of her clothes at Turlock. [Tr. p. 64.]

On redirect examination in reference to the circumstances surrounding the execution of the Declarations of Homestead [App. Ex. "8" and Trustee's Ex. "A"] in the first of which he described himself as a single man and in the second as the head of a family, appellant testified as follows:

"Well, Mr. Jones just did not know I had children at the house or anything, and he set it up, and as soon as he found out about it the next day, he said 'we will have to change it immediately', that was not through any fault of his, because it was a rush, 'Are you married?' and I said 'no' and that is the way it went in, that I am not a married man". [Tr. pp. 71-72.]

ARGUMENT.

The Referee's Decision Holding That the Declaration of Homestead Is Null and Void Is Predicated Upon Three Propositions.

1. That "the Declaration does not state that the bankrupt and minor daughter are residing upon the premises at the time of making the declaration"; [Certificate of Review, Tr. p. 28.]

2. That the minor child was living with her maternal grandmother "who has supported and maintained her granddaughter Roberta while living with her" and that "the father has contributed very little if anything to the care and maintenance and support of his minor daughter since at least September 1956." [Certificate of Review, Tr. p. 29.]

3. That the custody of the said minor child had been awarded to the mother by a Nevada court. [Certificate of Review, Tr. p. 27; see also Find. VII, Tr. p. 19.]

The Statements Required in a Declaration of Homestead by the Head of a Family.

Section 1263 of the California Civil Code sets forth that the Declaration of Homestead by an unmarried person claiming the exemption of a head of a family must contain:

1. "A statement showing that the person making it is the head of a family, and if the claimant is married, the name of the spouse . . .

2. "A statement that the person making it is residing on the premises, and claims them as a homestead.

3. "A description of the premises.
4. "An estimate of their actual cash value.
5. "(Character of the property, etc.)"

Nowhere in any of the statutes of California pertaining to homesteads is there any requirement that the declaration state that any person *other than the declarant* is residing on the premises at the time of making the declaration. Nor is there any case law in California indicating that such a declaration must contain a statement to that effect.

Section 1261, California Civil Code, among the definitions of "head of a family" includes "every person who has residing on the premises with him or her, and under his or her care and maintenance, * * * his or her minor child * * *". That definition has been part of the Civil Code since its original enactment in 1872.

In 25 Cal. Jur. 2d 349, Section 45, in reciting the statements which are necessary to a valid declaration of homestead it is said:

"[T]he present statute requires only that the claimant show residence. It does not require that he take his family with him to establish a residence on the property to be homesteaded, but only that the person making the Declaration be residing on the premises."

Citing

Turnbeaugh v. Santos (9th Cir.), 146 F. 2d 168;
Skinner v. Hall, 69 Cal. 195, 10 Pac. 406 (In which it was held that a declaration of homestead may be made on premises whereon the claimant has actually resided for only one day, though his family resided elsewhere at the time).

The *Turnbeaugh* case quotes with approval from the *Skinner* case. In the *Turnbeaugh* case there was an objection by a creditor to the allowance by the trustee of the homestead exemption claimed. At the hearing before the referee on the objection the latter held the homestead to be invalid. The District Court affirmed the order of the referee without opinion. This Court reversed the referee and the District Court.

The facts in that case were that the bankrupt had bought a parcel of land and had put up a one-story frame building which he used as a temporary residence, intending to use it later as a garage after he had constructed a six-room residence on the premises. He and his family lived in a rented house nearby. The bankrupt put into this one-story-temporary residence a bedroom set, library table, rugs, and oil heater and later a wood stove. Until a well was dug in December, drinking water was brought to the temporary structure from the rented house. On November 14, 1940, the family moved into the temporary structure, and the next day the bankrupt's wife filed a declaration of homestead.

In holding that the appellants' intent to make the property their home was sufficiently shown, the court quoted at length from the *Skinner* case including the portion that held: "that it was immaterial that the wife and child were living at another house as long as his residence was actual."

The opinion in the *Turnbeaugh* case contains the following at page 171:

"None of the facts recited by appellee are inconsistent with this actual and intended residence in the house of the homesteaded lot. The young girls lived

with their adult brothers at the rented house which their parents had left, as did the wife and child in the *Skinner case*.”

The Evidence on the Matter of Support of the Minor Child.

It is respectfully submitted that the finding that the bankrupt had not supported or maintained the minor child during the period from September 1956 to May 8, 1957, is not supported by, and is, in fact, contrary to the evidence. It is also submitted that the Summary of Evidence set forth in the Referee's Certificate of Review, pertaining to the child's physical presence in the Summer of 1956 and pertaining to her support, is inaccurate in the following respects:

At Transcript page 29, it is stated that “Roberta apparently spent part of her 1956 summer vacation with her father at Temple City”.

Appellant's testimony in this regard was as follows:

“Q. During the school vacation period from June to September of 1956 did you support Roberta then?

A. Yes.

Q. (The Referee) From June to September where was she living physically? A. (The witness) Physically she was living here.

Q. (Mr. Gordon) At the Temple City address? At your home, in other words. A. Yes.” [Tr. p. 52.]

“Q. By Mr. Gordon: Between February and June of 1956 where was Roberta? Where was she physically present from February to June of 1956? A. She was up with her grandmother.

Q. Was she at her grandmother's before February of 1956 or was that her first semester away from home? A. That was her first full semester.

Q. So, from February to June of 1956 she was in Turlock? A. Yes.

Q. Prior to February of 1956 where was she making her home? A. Well, part of the time down here, and then whenever it was we sent her up there—I forget the exact date.

Q. Did she return to your home in June of 1956? A. Yes.

Q. And she remained until when? A. Labor Day.

Q. Then where did she go? A. Back to Turlock." [Tr. pp. 50-51.]

In the Certificate of Review [Tr. p. 29], it is stated that after resuming school in Turlock in September 1956, Roberta has continued to live "with her said maternal grandmother who has supported and maintained her granddaughter, Roberta, while living with her", and "The father has contributed very little, if anything, to the care, maintenance or support of his minor daughter since at least September 1956."

Appellant's testimony on the matter of support (and the only evidence in the record) was as follows:

"Q. During the time she was in Turlock, specifically from February 1956 to June, did you support Roberta; pay for her clothes or food and the necessities of a child? A. Yes; whatever her grandmother thought was sufficient.

Q. In other words, the grandmother would write you and ask you for money and you would send some up. Is that correct? A. Yes.

Q. During the school vacation period from June to September of 1956 did you support Roberta then?

A. Yes.

Q. After she went back after Labor Day of 1956 did you continue to support Roberta? A. Yes, sir."

[Tr. pp. 51-52.]

Q. In résumé let me put it this way, Mr. Blagg; from the time Mrs. Blagg left in December of 1954 through June of 1956, with the exception of the period from February 1956 to June 1956, both your eldest daughter Frances and your daughter Ann lived with you? A. Yes, sir.

Q. And Roberta, with the exception of that period from February to June 1956? A. Yes.

Q. And you provided the support for all three of them, did you not, during that period of time? A. Yes, sir.

Q. Including the time that Roberta was in Turlock between February and June of 1956? A. Yes.

Q. And you also supported Roberta from June of 1956 through the entire year of 1956. Is that correct? A. Yes, sir.

Q. And also for this much of 1957 that has already elapsed? A. Yes." [Tr. pp. 56-57.]

In cross-examination appellant testified:

"Q. Let's talk about the support. You told your attorney that you supported Roberta. How did you support her? Let's begin as soon as she went north to Turlock. Did you take her up north to Turlock or did she go by herself or did someone come and get her? A. I sent her up by train.

Q. You didn't go with her? A. No.

Q. Did you send a sum of money with her then?
A. Yes.

Q. How much? A. I wouldn't remember.

Q. Did you make an arrangement with Clara Sims to send a definite sum of money each month?

A. No, I didn't.

Q. Did you send a definite sum of money each month? A. No, sir.

Q. Did you send money at all? A. Yes, sir.

Q. How did you determine how much to send?
A. Well, it is on a ranch, and Clara just figured it out, how much her board and room was, I guess; then when she wanted extra money for clothes she would tell me.

Q. Did you pay her board and room? A. Well, I mean, I paid for her school, her clothes and a small amount for her board and room. It wasn't anything like that \$20 a week in there or anything.

Q. How much did you average paying on the support for board and room? A. I don't really know.

Q. Did you send a regular sum at all? A. At the time we were talking about Clara said \$35 to \$40 a month was plenty, because that is as much money as they could get in an institution, you know, a County institution or something.

Q. Did you send that sum? A. Approximately. As I say, there was more at times, because when she needed clothes, why, they would ask for some money.

Q. You would send the money up and the clothes would be purchased then. Is that correct? A. Yes."
[Tr. pp. 63-64.]

The Custodial Award of the Minor Child by the Nevada Court.

It is undisputed that Roberta was at no time during the progress of the divorce action actually present in the State of Nevada; and that she was actually domiciled in and physically present in the State of California during all of that time.

This presents the question of whether the Nevada Court had the power to either award the custody of Roberta to Mrs. Blagg or had the power to enter a support order against Mr. Blagg. It is not claimed that Mr. Blagg was served with process in the State of Nevada. It is undisputed that he was served with such process in California, It is not claimed that Mr. Blagg made an appearance in the Nevada action.

The applicable rule is stated in 4 *A. L. R.* 2d at page 25 and is as follows:

“The physical absence of the child from the state at the institution of the proceedings, together with the fact that the child is not domiciled within the state, has been held to negate jurisdiction in the court to make a valid award of custody.”

Among the California citations listed in the Annotations are:

De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345;

Boens v. Bennett, 20 Cal. App. 2d 477, 67 P. 2d 715;

In re Chandler, 36 Cal. App. 2d 583, 97 P. 2d 1048.

The Annotation at page 26 states the rule to be:

“Even though the court has jurisdiction of the parents or persons with power to bring the nonresident child within the state, still the court has been held to lack power to make a custody award.”

The Annotation further states, at page 27,

“Particularly is power lacking to make a custodial award if the court does not have jurisdiction of the person legally entitled to custody or the person with power to produce the nonresident child who is physically without the state.”

The California cases cited in support of this statement are *De La Montanya v. De La Montanya* and *Boens v. Bennett, supra*.

In the case of *Boens v. Bennett, supra* (20 Cal. App. 2d 477, 67 P. 2d 715), the facts were that the wife, the defendant in the divorce action, was a resident of New York when the divorce suit by the husband was filed in California, and that the minor son was also a resident of the State of New York, where he continued to reside during the divorce proceedings. The wife had been served by publication. At page 480, the Court said:

“The trial court held that jurisdiction in the divorce action rested upon substituted service, accomplished by mailing and publication, as a result of which the court found that the California court in the divorce action was without jurisdiction to deal with the custody of the minor children. In this we think the trial court was correct. Where, as in the divorce case here involved, the defendant wife, residing without the territorial jurisdiction of the California courts, was served by publication, did not appear, it cannot properly be said that there was a defendant in court.

In this proceeding, the court had before it only the status of the plaintiff husband. The summons, when served by publication upon the wife, a nonresident, was not really a writ to bring the defendant wife into court, but merely a notice prescribed by statute in the interests of fairness, and to rebut the idea that the proceeding was secret. (2 Bishop on Marriage and Divorce, sec. 159.) It brought the *res* into court and not the defendant. The adjudication must be confined to that status. As Judge Cooley, in his Constitutional Limitations (7th ed., p. 584), says: 'The publication which is permitted by the statute is sufficient to justify a decree in these cases changing the status of the complaining party, and thereby terminating the marriage; and it might be sufficient also to empower the court to pass upon the question of the custody and control of the children of the marriage, *if they were then within its jurisdiction. But a decree on this subject would only be absolutely binding on the parties while the children remained within the jurisdictions; if they acquire a domicile in another state or country, the judicial tribunals of that state or country would have authority to determine the question of their guardianship there.*' (Italics added.)

"If the children are within the jurisdiction, and the defendant is personally served with summons, and perhaps if he is not, the court may award the custody of the children to one of the parents. (De La Montanya vs. De La Montanya, 112 Cal. 101, 116 [44 Pac. 345, 53 Am. St. Rep. 165, 32 L. R. A. 82].) Where the children are domiciled, as was the case in the divorce action under consideration here, outside the jurisdiction of the California courts, the remedy of the plaintiff husband must, generally speaking in such cases, be confined to a dissolution of the mar-

riage, with the incident benefits springing therefrom, but he cannot legally obtain an order for the custody of the children domiciled without the state. (*De La Montanya v. De La Montanya*, *supra*, p. 117. See, also, Freeman on Judgments, secs. 584, 585; Brown on Jurisdiction, secs. 6, 8, 78, 79.)” (A hearing by the California Supreme Court was denied.)

To the same effect; *In re Chandler*, 36 Cal. App. 2d 583, 97 P. 2d 1048:

The Referee, in his Memorandum Opinion [Tr. pp. 10-16], cites as “closely analogous” to the instant matter, the case of *Master Lubricants v. Cook*, 159 F. 2d 679 (decided by this Court), in support of the proposition that where custody of a minor child has been awarded to the mother, the father as head of a family has no further obligation to the child and therefore there was no basis for maintaining the homestead.

The question involved in that case was whether there had been an abandonment of the homestead which therefore had been filed. No question was involved of the power of the trial court to award the custody of a minor child not within the jurisdiction of that court. While the case does not specifically disclose that the divorce suit was filed in California where both parties and the child had their domicile and residence, it is obvious that that was in fact the situation. The case speaks of an “Interlocutory Decree” and “Final Decree” terms which are peculiar to California practice. The records of the Los Angeles County Clerk’s office disclose that the divorce action was filed in Los Angeles County under the title of *Minnee M. Cook, Plaintiff vs. George Oscar Cook, Defendant*, Case No. D-221735. The records of this Court corroborate that fact.

The Validity of the Declaration of Homestead Treated as a Declaration of a Single Man.

The Referee ruled the declaration of homestead to be *wholly* null and void and refused to allow a homestead exemption to appellant in the lesser amount applicable to a single person.

Assuming, *arguendo*, that appellant is not entitled to a homestead exemption as the head of a family, appellant nevertheless contends that in any event he is entitled to the homestead exemption of \$5,000.00 allowed to a single person. (Cal. Civ. Code, Sec. 1260(2).)

In setting forth his claim of exemption in Schedule B-5 in his Debtor's Petition, appellant stated the basis of his claim in the following manner:

“Petitioner's 11 year old daughter resides with petitioner during the summer months school vacation and petitioner therefore believes he is entitled to the exemption provided by Sections 1260-1261 of the California Civil Code, to wit: \$12,500.00.”

Appellant submits that the California cases of *Feintech v. Weaver*, 50 Cal. App. 2d 181, 122 P. 2d 606, and *Johnson v. Brauner*, 131 Cal. App. 2d 713, 281 P. 2d 50, support his contention that petitioner is at least entitled to the \$5,000.00 exemption extended to a single person.

The *Feintech* case was an action to quiet title in the plaintiff to certain property he had purchased at an execution sale as a judgment creditor. The defendant sought to quiet title in herself by reason of a homestead which she asserted defeated the execution sale. It was shown that when the defendant executed the declaration of homestead she used a printed blank designed for use by the head of a family. She was not in fact the head of a

family because she was not married but was living with an adult son upon the property which she attempted to homestead. It was stipulated that the declaration contained all of the recitals prescribed by the California Civil Code relative to persons "not the head of a family". The trial court upheld the validity of the homestead to the extent of the exemption allowed a single person. The plaintiff contended that the additional recital contained in the homestead declaration to the effect that the claimant was the head of a family, when in fact she was not, destroyed its effectiveness and made it no declaration of homestead at all.

The reviewing Court in rejecting this contention and upholding the trial court said at page 183:

"In the recent case of *Greenlee v. Greenlee*, 7 Cal. (2d) 579 (61 Pac. (2d) 1157) at page 583, our Supreme Court states: 'The homestead laws have always been given a most liberal construction in order to advance their beneficial objects and to carry out the manifest purpose of the legislature.' This has always been the rule of construction laid down by our California courts. (*McKay v. Gesford*, 163 Cal. 243 (124 Pac. 1016, 41 L. R. A. (N. S.) 303); *Estate of Levy*, 141 Cal. 646 (75 Pac. 301, 99 Am. St. Rep. 92); *Keyes v. Cyrus*, 100 Cal. 322 (34 Pac. 722, 38 Am. St. Rep. 296); *Southwick v. Davis*, 78 Cal. 504, (21 Pac. 121); *Roth v. Insley*, 86 Cal. 134 (24 Pac. 853); *Simonson v. Burr*, 121 Cal. 582 (54 Pac. 87); 26 Cal. L. Rev. 241);

"There are California cases in the which it would seem that the expressed rule of liberality has not always been followed, particularly in decisions involving homestead declarations, and in which a rather strict

compliance with the provisions of the code has been required. Most of these cases have held declarations invalid because of the *omission* of some one of the matters required by the code to be included in them. (*Jones v. Gunn*, 149 Cal. 687, (87 Pac. 577); *Ashley v. Olmstead* (1880), 54 Cal. 616; *Hansen v. Union Savings Bank*, 148 Cal. 157 (82 Pac. 768); *Reid v. Englehart-Davidson Mercantile Co.*, 126 Cal. 527 (58 Pac. 1063, 77 Am. St. Rep. 206).

“The authority closest in point to the facts we are now considering is *Roth v. Insley*, *supra*. In that case it was contended that the homestead was invalid because a son made a declaration of homestead as head of a family when his only claim to be such was that his mother resided on the property with him. The decision turned upon the main question as to whether the homestead continued after the death of the mother, but in concurring opinion Mr. Chief Justice Beatty stated: ‘The declaration of homestead in this case did not show that the claimant was the head of a family. It merely stated that he was, at the date of the declaration, actually residing on the premises with his mother, and altogether fails to state that she was under his care and maintenance, a condition made essential by the statute . . . But it was a good declaration for any person other than the head of a family, and sufficient to secure a homestead right of exemption to the extent of one thousand dollars . . . Such being the case, the homestead could not be sold under execution upon a judgment other than one of those enumerated in section 1241 of the Civil Code, without taking the steps prescribed in section 1245 *et seq.*’

“In the case at bar disregarding the recital that the claimant was the head of a family, treating it as

surplusage, we have a declaration of homestead which contains every element required by the Civil Code, and which would be upheld without question in any court. To give this effect to the instrument secures to the defendant the right to a home, which the Constitution of our state (article XVII, section 1) enjoins the Legislature to protect.

“It is therefore concluded that the homestead declaration in this case should be given a liberal construction; that the recital in question is surplusage and unnecessary; and that there was a valid homestead upon the property in question which defeated the attempt of the judgment creditor to take title to an execution sale.”

In the *Johnson* case *supra* (121 Cal. App. 2d 713) the declaration of homestead there involved disclosed a failure by the wife to add the statutory requirements “that she, therefore, makes the declaration for their joint benefit” as required by Section 1263 of the California Civil Code.

The trial court found that there had been a substantial compliance with the requirements of Section 1263(1), notwithstanding the fact that such declaration did not contain the precise words that the declaration was made for the joint benefit of husband and wife, and rejected the contention of the appellant to the effect that while homestead and homestead exemptions are remedial and generally must be liberally construed, yet it was equally true that homestead and homestead exemptions are creations of statute and failure to comply with any requirement essential to a valid declaration cannot be supplied by liberal construction.

The reviewing court upheld the trial court in this respect, saying on page 716:

“There are two apparently conflicting lines of decisions in this state, applying as occasion demands the ‘strict construction’ or the ‘substantial compliance’ rule. But they are not irreconcilable. And the necessity and basis for harmonizing them were foreshadowed in *Southwick v. Davis*, 78 Cal. 504 (21 P. 121) . . . It was there held that a statement in the declaration that the property ‘does not exceed in value the sum of five thousand dollars’ was sufficient compliance with the requirement of ‘an estimate of their actual cash value.’ (Civ. Code, Sec. 1263, subd. 4.) At page 507 the court said: ‘Of course, it was necessary for the legislature to provide some manner by which one desiring to claim a homestead should make a public declaration of the fact, and designate the particular premises intended to be so claimed. But surely statutory provisions to that end should not be subjected to the rule of strict construction. Statutes for the purpose of carrying out the constitutional command are remedial, and should be liberally, or at least fairly and reasonably, construed. The homestead right is not one to be industriously pinched, and circumscribed, and circumvented, and beaten back. If the *facts* of an honest homestead claim be present, a substantial compliance with statutory provisions about making the claim public should be deemed sufficient.’ And at page 508: ‘When these several acts have been substantially performed, and when the declaration contains the essence of the statutory requirements, the construction should be so liberal as to *advance* the object of the construction and the statute’.

“A review of the authorities discloses that ‘when the declaration contains the essence of the statutory requirements’ the courts have upheld a reasonably successful attempt to follow the prescribed form but that they have refused to dispense entirely with any of the essential matters set forth in sub-divisions 1 to 4 of section 1263. This view is reflected by the opinion in *Feintech v. Weaver*, 50 Cal. App. 2d 181, 183 (122 P. 2d 606), wherein the Court says:

“(At this point the Court quotes at length from the *Feintech* case, which is contained in the quotation above given from the *Feintech* case).”

This appellant made an honest and forthright disclosure of all of the facts upon which based his claim of a homestead exemption as the head of a family; namely, that Roberta resides with him at his home during the summer school vacations, and that he “therefore believes that he is entitled to the exemption provided by Sections 1260-1261 of the California Civil Code, to-wit, \$12,500.00.” Whether as a matter of law, that limited residence of the child did or did not entitle appellant to the \$12,500.00 homestead exemption, the fact still remains that his declaration contained all of the essentials required to be set forth in a declaration by a single man which would entitle him to a \$5,000.00 homestead exemption. Stated another way, appellant did not *omit* any of the essential allegations required to be set forth in a declaration by one entitled to a \$5,000.00 exemption.

It seems to be a rather harsh penalty to be deprived of all homestead rights because of an erroneous belief (if such be the case) that the facts stated did not entitle the declarant as a matter of law to the larger exemption as the head of a family.

The referee did not make a finding to the effect that appellant was guilty of fraud or dishonesty, nor is there any such implication in either the Memorandum Opinion or Findings of Fact.

Respectfully submitted,

MARK F. JONES, and

MAURICE GORDON,

By MAURICE GORDON,

Attorneys for Appellant.

APPENDIX.

EXHIBITS, BANKRUPT'S:

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No. 15933

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEWIS F. BLAGG,

Appellant,

vs

IRVING I. BASS, Trustee in Bankruptcy of the Estate of
Lewis F. Blagg, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

C. E. H. McDONNELL,

548 South Spring Street,
Los Angeles 13, California,

Attorney for Appellee.

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APPELLEE'S BRIEF.

ARGUMENT.

I.

The Referee Correctly Determined That Appellant Was Not Entitled to a Homestead in the Amount of \$12,500.00.

The factual situation presented here, and outlined at length in appellant's brief, is simple: the bankrupt Blagg, on December 19, 1956, filed a declaration of homestead with the County Recorder of Los Angeles County in which he claimed the right to an exemption of \$12,500.00 on the theory that he was then "head of a family." The referee's task in the first instance, then, was to determine whether or not the facts were such as to bring this case truly within that declaration.

The referee has found [see Tr. p. 19]:

“From at least September, 1956, to and including May 8, 1957, the date of the hearing herein, Roberta Blagg, the minor daughter of the bankrupt herein, has not resided with her father, Lewis F. Blagg, upon the premises claimed as homeland (*sic*) as the head of a family located at 11042 West Hondo Parkway, Temple City, California, but, on the contrary, the care, custody and control of said minor child has by judicial decree been awarded to her mother and she has during all of such period resided with her maternal grandmother and the bankrupt has not supported or maintained said minor child during the said period.”

It is obvious from the evidence appearing in the record that the bankrupt is attempting to bring himself within the statutory definition of “head of a family” based upon the residence of his twelve-year-old daughter, Roberta. The applicable law is found in Section 1261 of the California Civil Code which defines what is meant by the phrase “head of a family” as used in California Civil Code, Section 1263:

“The phrase ‘head of a family,’ as used in this title, includes within its meaning:

* * * * *

2. Every person *who is residing on the premises with him or her*, and under his or her care and maintenance, either:

(a) His or her minor child, or minor grandchild, or the minor child of his or her deceased wife or husband; * * *” (Emphasis supplied.)

When is one “residing” on the premises as that term is used in California Civil Code, Section 1261? Research has failed to reveal a single case which interprets that

word in connection with the homestead statutes of the State of California. "Residing" is, however, a fairly common word, frequently used in other statutory contexts.

California courts have construed, in other contexts (see Cal. Code Civ. Proc., Sec. 395) the word "residing" to mean to "live," "dwell," "abide," "sojourn," "stay," "remain," or "lodge in a given place." (See *Bohn v. Betty Biscuits, Inc.*, 26 Cal. App. 2d 61; *Western-Knapp Engineering Co. v. Gilbank*, 129 F. 2d 135.)

Whether or not, then, a person "resides" on the premises under California Civil Code, Section 1261, is a question of fact. It appears now to be settled that determinations of facts by a referee, and as adopted by the District Court, are to be accepted upon appeal unless those findings are clearly erroneous. (See *Baukrupcty General Order 47*; *Ott v. Thurston* (C. C. A. 9th), 76 F. 2d 386; also *In re Kossach*, 135 Fed. Supp. 884.)

Respondent submits that the finding of the referee was supported by substantial evidence on the question of the lack of "residence" of Roberta with her father. Consider the following uncontradicted facts:

(1) Shortly after the wife obtained an uncontested Nevada decree of divorce in May, 1955, Roberta was sent, unaccompanied, to Turlock, California, there to live with her *maternal* grandmother.

(2) Since first being dispatched to Turlock, California, Roberta has come home only on vacations and was last at home, prior to the hearing, in early September, 1956.

(3) Upon her return to Turlock in September, 1956, Roberta took with her all of the clothes which fit her, leaving behind her in Temple City only such personal items

as which are of no further use to her while residing with her maternal grandmother.

On these facts, Appellee does not see how it can be said that on December 19, 1956 Roberta was either dwelling, abiding, sojourning, staying, remaining, or lodging with her father in Temple City, California; the fact is that she was on December 19, 1956, and had been for many months prior thereto, residing in Turlock, California.

Against this proposition appellant argues that “the referee’s decision holding that the declaration of homestead is null and void is predicated upon three propositions.” He then cites as the three propositions the following (see Appellant’s Op. Br. p. 11):

“1. That the Declaration does not state that the bankrupt and minor daughter are residing upon the premises at the time of making the declaration’ [Certificate of Review, Tr. p. 28];

2. That the minor child was living with her maternal grandmother ‘who has supported and maintained her granddaughter Roberta while living with her’ and that ‘the father has contributed very little if anything to the care and maintenance and support of his minor daughter since at least September 1956’ [Certificate of Review, Tr. p. 29];

3. That the custody of the said minor child had been awarded to the mother by a Nevada court. [Certificate of Review, Tr. p. 27; see also Find. VII, Tr. p. 19.]”

First of all, it will be noted that all three of the “propositions” are culled from the Referee’s Certificate on Review, which is a portion of the record here [Tr. pp. 25-31]. Appellee submits that for appellant to pro-

ceed in this fashion is a misleading misconception of the purpose of the Referee's certificate. Under Bankruptcy Act Section 33 (U. S. C., Title 11, Ch. 5, Sec. 67), the duty of the referee in connection with a certificate on review is clearly set forth:

"Referees shall * * * (8) prepare promptly and transmit to the clerk's certificates on petitions for review of orders made by them, together with a statement of the questions presented, the findings and order thereon, the petition for review, a transcript of the evidence or a summary thereof and all exhibits; * * *"

Thus, the purpose of the Certificate on Review is simply to supply a summary of evidence to the District Judge for his guidance in considering the matter of review. It is not under the law the only basis of the referee's findings and conclusions—they are based upon all of the evidence educed before him, see *Matter of Pearlman* (C. C. A. 2d), 16 F. 2d 620.

Appellee argues that a correct analysis of the statutes involved here will support the statement of the referee in his certificate that "the declaration does not state that the bankrupt and minor daughter are residing upon the premises at the time of making of the declaration." Consider for a moment California Civil Code, Section 1263, which states as follows:

"The declaration of homestead must contain:

1. A statement *showing* that the person making it is the head of a family, * * *"

Now, how does one evince that he is "head of a family"? This is done by compliance with California Civil Code, Section 1261, as previously cited, which defines what is

a "head of a family." Thus, to bring himself within the cited section of California Civil Code, Section 1263, it would have been necessary for the bankrupt to state in this case that the declarant had residing on the premises with him at the time of its execution his minor child Roberta.

On the question of the support of the child Roberta, appellee wishes to call this court's attention to the indefiniteness of the testimony of the bankrupt. No definite sum of money was sent for support [Tr. p. 63]. The bankrupt testified he did not know how much was the average pay for support and for board and room to Clara Sims, Roberta's maternal grandmother [Tr. p. 63]. Neither could the bankrupt recall how much money was sent with Roberta when she went north on the train [Tr. p. 63]. Certainly the conclusion of the referee who saw the witness before him, observed his demeanor should have very strong weight here in determining which portions of the very indefinite testimony given by the bankrupt is to be believed.

As to the award of custody by the Nevada court, whether or not it is legally binding upon the bankrupt, certainly when taken together with the other facts in this case, and in particular with the fact that very shortly after the decree Roberta passed, except for vacation periods, into the house of her maternal grandmother, it is evidence on the question of whether or not Roberta was actually "residing" with her father on the property claimed as a homestead on December 19, 1956.

II.

The Referee and District Court Correctly Determined That the Bankrupt Was Not Entitled to the Homestead Exemption of a Single Man.

The Referee has ruled that inasmuch as the declaration fails as that of the "head of a family," it must likewise be rejected as the homestead of a single man. This proposition is vigorously attacked by the petitioner and there is squarely presented the question: When a declaration of homestead by the head of a family, as that term is defined in California Civil Code, Section 1261, is defective, can the homestead provided by California Civil Code, Sections 1238 and 1266 be sustained?

A complete review of the decisions on this point is most instructive.

Petitioner cites at length *Feintech v. Weaver* (1942), 50 Cal. App. 2d 181. This was an action in which the defendant, Weaver, while residing on real property with an adult son, executed a homestead on the printed form intended for the use of a "head of a family." All the statements required for the declaration of a single person's homestead were included. The only impediment to the allowance of the single person's homestead was the printed language indicating that the defendant, Weaver, was the "head of a family." The court treated the printed language as mere surplusage and granted the homestead as that of a single person. This case relied on *Roth v. Insley*, 86 Cal. 134. There the problem was raised only in a concurring opinion. There the declarant had failed to state that his mother was "under the care and maintenance" of the declarant as required by statute.

Petitioner also relies on the recent case of *Johnson v. Baruner* (1955), 131 Cal. App. 2d 713. This case is

not in point other than for the principle that the homestead law should be liberally construed. It does, however, cite the *Feintech* case with approval on this point. In the *Johnson* case, a declaration of homestead by a wife had been made after a quitclaim deed had been received from the husband on joint tenancy property. The declaration of homestead was filed after an attachment but before the execution on a judgment. It was contended that the homestead was defective because it did not state that the homestead was made for the joint benefit of both husband and wife. The Appellate Court applied a liberal rule and upheld the homestead. Thus, there was never presented at all the problem of the allowance of the homestead for other than the "head of a family."

Petitioner fails to cite *in re Mapes* (1954), 120 Fed. Supp. 316. This case was decided by the Honorable Ernest Tolin in the District Court for the Southern District of California, Central Division. There, a trustee in bankruptcy refused to recognize a homestead, whereupon the bankrupt made objections to the report of exempt property, just as was done in the instant case. The Referee rejected the objections and sustained the report of exempt property, disallowing the homestead. In that case, the declaration of homestead was filed by the husband as the head of a family with a wife and two children. The homestead failed to conform to the statutory requirement that the wife be named. Judge Tolin, in a lengthy and able opinion, sustained the Referee and refused to allow the homestead as that of a single man saying at page 317 of 120 Fed. Supp:

"The bankrupt's theory is that there are two types of homestead allowed by the law of California. First, that prescribed by Section 1263 of the Civil Code

which is available to heads of families; and, secondly, the type of homestead allowed by Section 1266, Civil Code. * * * The two distinct types of declaration allowed by the two statutes are for diverse classes of declarants. A homestead is either in one class or the other and must couch his declaration in the form prescribed for the class in which he falls.”

The court goes on to cite the language in Code of Civil Procedure Section 1266, then adds:

“Any person *other than the head of a family*, in the selection of a homestead must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a ‘declaration of homestead.’” (Emphasis supplied.)

The court relied upon the California case of *Hanson v. Union Savings Bank* (1905), 148 Cal. 157. In that case an action was instituted to quiet title by the purchaser of certain real property at a foreclosure sale. Before the foreclosing mortgage was executed, the holder of the property had made a declaration of homestead which was invalid because the declarant, a married woman, omitted certain material required by the homestead statute. In the quiet title action, the declarant wife contended that the homestead, admittedly invalid as the homestead of a “head of a family” should be allowed as that of a single person. The court rejected this contention, pointing out, as did Judge Tolin, the provision for the homestead for a single person, not the head of a family, by its terms referred to a person in another group than that which was claimed in the “head of a family” homestead.

Respondent contends that the *Feintech* and *Roth* cases, which upon cursory inspection may appear to be contrary to the *Mapes* and *Hanson* cases, are in reality distinguish-

able. A careful reading of the *Feintech* and *Roth* cases will reveal that in these no actual effort was made to assert a "head of a family" homestead. In the *Feintech* case, for example, it is apparent that the declarant simply obtained the wrong printed form and in a layman's ignorance filled it out and filed it. Relief in such a situation is not only understandable but quite proper under the liberal interpretation of homestead law. In the *Mapes* and *Hanson* cases, however, an entirely different situation is presented: In these two instances, every effort was made to assert the larger "head of a family" homestead. It is only after the homestead has failed of its larger purpose that an effort is made to salvage something by contending that the declarant should be put into the other class.

The instant case clearly belongs with the *Mapes* and *Hanson* cases. The bankrupt Blagg first filed, under oath, a declaration of homestead which represented him to be a single man, saying nothing whatever about any other rights as the "head of a family." Immediately thereafter this was abandoned and a new homestead, obviously the result of a second thought, was filed in which the bankrupt Blagg attempts to bring himself under the "head of a family" rule.

Respondent insists that upon principle the rule asserted in the *Mapes* case is correct. The law permits a person to select into which category he believes he belongs—"head of a family" or "single person." It is clear from the language of Code of Civil Procedure Section 1266 that no one can be both at once. If the bankrupt Blagg, for example, chooses to attempt to bring himself under the larger exemption, then thereby he excludes himself from the smaller, and when he fails to qualify he should not be heard to attempt a reclassification.

On theory, this is a proper protection for the creditor community. If the rule of the *Feintech* case is extended to those who deliberately attempt to qualify as the "head of the family" with the thought that if they fail in this they can always salvage the exemption of a "single man," then the possibilities of fraud upon the creditor community are obvious. Since the creditor in almost every case must rely upon the statements on the face of the declaration of homestead, the effect of the larger declaration is to make it seem that there is potentially a lesser equity in homesteaded property than may actually be the case. Certainly, it is not too much to demand that those who seek to so impose upon creditors should not be able to later on take the advantage of the lesser homestead exemption when they fail in the claim of the larger.

Conclusion.

Appellee insists that the decision of the referee, and the findings of fact and conclusions of law on which it is based, as sustained by the District Court are correct. There is sufficient evidence to support the referee's findings of fact that determine that the bankrupt and appellant Blagg cannot qualify as the "head of a family" because at the time of the execution of the declaration of homestead Roberta, the daughter of the bankrupt, was not actually "residing" on the premises which are the subject of the asserted homestead.

The referee has also correctly determined, and been correctly sustained by the District Court, that upon failure of the homestead as that of a "head of a family," it must be rejected entirely and cannot be allowed as the homestead of a single man.

Respectfully submitted,

C. E. H. McDONNELL,
Attorney for Appellee.



